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REPORTS

499

OF

CASES IN LAW AND EQUITY

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

CONTAINING THE DECISIONS AT

SAVANNAH AND MACON, JANUARY TERMS, AND
PART OF THE ATLANTA, MARCH TERM, 1858.

VOLUME XXIV.

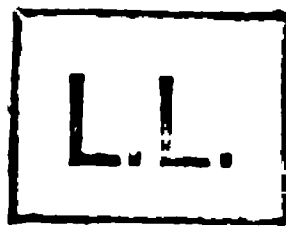
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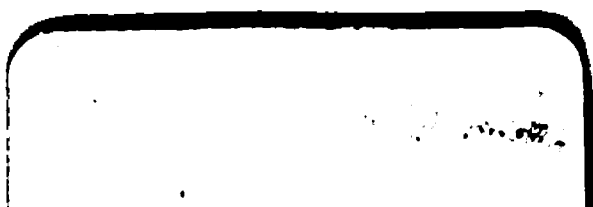
COLUMBUS, GEORGIA, 1859.



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JUDGES OF THE SUPREME COURT.

HON. JOSEPH H. LUMPKIN, ATHENS.

HON. CHARLES J. McDONALD, MARIETTA.

HON. HENRY L. BENNING, COLUMBUS.

B. Y. MARTIN, Reporter, COLUMBUS.

ROBERT E. MARTIN, Clerk, MILLEDGEVILLE.

JUDGES OF THE SUPERIOR COURT.

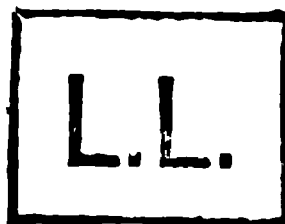
PRESIDING DURING THE PERIOD OF THESE REPORTS.

Brunswick District,	Hon, A. E. COCHRAN, Brunswick.
Blue Ridge District,	" GEO. D. RICE,
Chattahoochee District,	" E. H. WORRELL, Talboton.
Cherokee District,	" T. TRIPPE, Cassville.
Coweta District,	" O. A. BULL, LaGrange.
Eastern District,	" W. B. FLEMING, Savannah.
Flint District,	" E. G. CABANISS,
Macon District,	" ABNER P. POWERS, Macon.
Middle District,	" W. W. HOLT, Augusta.
Northern District,	" JAMES THOMAS, Beulah P. O.
Ocmulgee District,	" R. V. HARDEMAN, Clinton.
Pataula District,	" DAVID J. KIDDOO, Cuthbert.
Southern District,	" PETER E. LOVE, Thomasville.
S. Western District,	" ALEX. A. ALLEN, Bainbridge.
Tallapoosa District,	" DENNIS F. HAMMOND, Newnan.
Western District,	" N. L. HUTCHINS, Lawrenceville.

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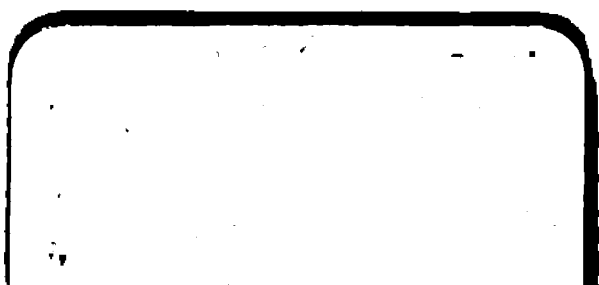
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CASES
ARGUED AND DETERMINED IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT SAVANNAH, JANUARY TERM, 1858.

Present—JOSEPH H. LUMPKIN,
CHARLES J. McDONALD, } Judges.
HENRY L. BENNING,

CHARLES GANAHL, surviving partner, plaintiff in error, vs.
JAMES SHORE, defendant in error.

- [1.] Where the judgment of the Court below is not excepted to generally, but upon grounds which are specified, the bill of exceptions cannot be amended so as to include other grounds, upon the hearing of the cause.
- [2.] Books of accounts in all occupations which require books to be kept, are admissible in evidence, to prove the usual subjects of book charges in such business.
- [3.] The tendency of the judicial as well as the Legislative mind is to widen instead of to restrict the rules for the admissibility of evidence.

Complaint on account, in Chatham Superior Court. Decision by Judge FLEMING, January Term, 1857, on application for certiorari.

This case was heard by Judge FLEMING upon the following statement of facts:

This was a statutory action of account, brought in the City Court of Savannah, against Charles Ganahl, as surviving partner of Philo H. Wildman, by James Shore, for the wages of himself and wife as employees at the hospital of Wild-

Ganahl vs. Shore.

man & Ganahl, from February 3d, 1853, to June 1st, 1854. The plaintiff proved by the answers of the defendant to interrogatories under the statutes to compel discoveries at common law, that the defendant was the surviving partner of Wildman; that the plaintiff and his wife were in the employ of Wildman & Ganahl from the 3d of February, 1853, to the 15th of May, 1854, in the capacity of stewards of a hospital; that he was to receive therefor twenty dollars per month for the first part of the time, then twenty-five, and towards the end of the term thirty-five dollars, and also board and lodging, for the services of himself and wife.

The defendant proved by A. A. Smets, that he had had dealings with Wildman & Ganahl, as proprietors of the hospital, and found their charges correct. The books of account of Wildman & Ganahl were then offered in evidence, after the suppletory oath of the defendant. To which plaintiff objected, and the Court sustained the objection. The defendant then introduced the evidence of Dr. Cullen, taken by commission, who proved that he resided as resident surgeon and as a student in the hospital, under Drs. Wildman & Ganahl, from March, 1853, to about March, 1854; that he recognized the book of accounts, that it contained the accounts of the hospital of Wildman & Ganahl, and the charges against the patients and others; that he had been an eye-witness to business transactions between Wildman and Shore; had seen Wildman pay Shore wages for himself and wife, had heard Shore ask Wildman for wages, Wildman would then open this book of accounts, make out a check, hand it to Shore, and then proceed to charge it on Shore's account; that this was done repeatedly; that the account of Shore was on page 17 of the book. He recognized the book from his knowledge of Dr. Wildman's hand-writing, and from having seen him write on that page frequently; that the entries in Shore's account were all in Wildman's hand-writing, with the exception of one dated December, 22d, 1853, and another dated January 12th, 1854; that he had seen Wildman give

Shore checks on the bank; Shore gave no receipts; that the book was accessible to Shore, and witness had seen Shore examining it, and that Shore was steward of the hospital.

To the cross interrogatories he testified that he recognized the book of accounts from its containing his own hand-writing; that on the 3d of March, 1853, he saw Wildman pay plaintiff wages by giving him the check to the amount set forth in the account, that is \$20; that he had seen Wildman pay Shore at other times, but did not remember the dates or amounts; that he recognized Shore's account in the book from the fact that Shore's name appears in the account by the particular item of March 3d, 1853, and by other entries which he remembered generally. The defendant then moved to introduce page 17, (a copy of which is annexed,) of the book of accounts, as evidence of admissions of Shore, to which plaintiff objected, and the Court sustained the objection; whereupon defendant excepted, and after verdict found against him, filed his exceptions as follows:

1st. Because the Court refused to admit the books of Wildman & Ganahl as evidence before the jury.

2d. Because it refused to admit the Dr. and Cr. account between plaintiff and defendant, as surviving partner of Wildman & Ganahl, kept by P. H. Wildman, and sustained by *aliunde* testimony.

3d. That the Court erred in charging the jury that when the plaintiff had proved the employment, the amount of wages to be given, and the time of service, they must believe that no payment had been made, in default of defendant's producing a receipt, and that the jury must only give credit for the payment actually proved, and for the balance they must find a verdict for the plaintiff.

4th. Because the jury found contrary to law and evidence.

Upon said exceptions and upon petition, the writ of certiorari was issued and the case brought from the City Court,

Ganahl vs. Shore.

before his Honor Judge FLEMING of the Superior Court, who, after argument, affirmed the judgment of the City Court.

And counsel for defendant excepts to said decision and says:

1st. That the Judge erred in deciding that the book of accounts of Wildman & Ganahl was not admissible in evidence.

2d. The Judge erred in deciding that the account of Shore in said book was not admissible in evidence.

JOS. GANAHL & S. P. HAMILTON, for plaintiff in error.

WARD, OWEN, & JONES, for defendant in error.

The following is a copy of Shore's account as extracted from the book of accounts of Wildman & Ganahl, viz:

		MR. SHORE,	Dr.	Cr.
1853.				
Feb.	3	By 1 mos. wages self and wife,		\$20 00
"	3	Paid wife check,	\$10 00	
"	16	To cash paid self,	10 00	
Mar.	3	By 1 mos. wages self and wife,		20 00
"	"	To check for wages self and wife,	20 00	
Apr.	3	By wages self and wife,		20 00
"	5	To cash for wages self and wife,		
		3d inst.,	20 00	
May	3	By wages self, wife and little girl,		25 00
"	3	To cash for wages to 3d May,	25 00	
June	3	By wages self, wife and little girl		
		to date,		35 00
"	27	To cash in full to 3d inst.,	35 00	
			<hr/>	<hr/>
			\$120 00	\$120 00
July	30	To cash to wife for wages,	\$6 00	
Sept.	5	Cash for wages,	10 00	

Ganahl vs. Shore.

Oct.	4	"	"	"	20	00	
"	19	"	"	" to wife	10	00	
Nov.	15	"	"	"	10	00	
"	21	"		paid May & Co., for harness,	10	87	
"	25	"		for wages,	100	00	
"	25	"	"		45	00	
Dec.	8	"	"	to Mrs. Shore,	10	00	
"	22	"	"	to Shore,	10	00	
1854.							
Jan.	12			Cash for wages to Shore,	7	50	
"	12			For shrouding and washing Mrs. Wilson,			8 50
Mar.	8			To cash paid per order per Cord,	20	00	
"	8			To order saddle, &c.,	12	50	
Apr.	8			To cash paid Mrs. Shore,	8	00	
"	8			To paying Mrs. S.'s bill dry goods at Prendergast's, for 1853,	7	36	
June	1			To paying Mrs. S.'s bill at Pren- dergast's to date,	59	30	
"	30			To cash paid self for wages,	20	00	
July	22			To cash paid Minis' bill furni- ture,	14	50	
"	24			To cash paid Collins, ewer and basin,	1	00	
Aug.	5			To cash paid wife,	20	00	

This case being called for trial, counsel for plaintiff in error moved to amend his bill of exceptions, by inserting an additional exception or ground of exception to the judgment of the Superior Court, to-wit: because the verdict was contrary to law and the evidence, which motion the Court refused.

By the Court.—LUMPKIN, J. delivering the opinion.

This case originated in the City Court of Savannah and came before the Superior Court upon a writ of certiorari. Upon the hearing, his Honor, Judge FLEMING, affirmed the judgment of the City Court with costs; and to reverse this decision, this writ of error is prosecuted.

It is proposed to amend the bill of exceptions by inserting other grounds than the two originally taken. Had the plaintiff in error excepted generally to the decision of Judge FLEMING, affirming the judgment of the City Court, he would be entitled to be heard upon all the grounds taken in the certiorari. But he did not except to the whole judgment, but excepts specially to the decision upon two grounds only, namely: that the Court erred, 1st. in holding that the book of accounts of Wildman & Ganahl was not admissible in evidence before the jury; and 2dly, in ruling that the account of Shore in said book was not admissible as evidence. The defendant in error had a right to suppose that the argument in this Court would be restricted to the two errors specified. To let in other grounds now, would be to take the defendant by surprise, and thereby deprive him of the benefit secured by the IXth section of the Act of 1856. That section declares that it shall not be necessary to make any assignment of errors, as heretofore practiced in the Supreme Court, but that in lieu thereof, the case shall be heard upon the errors as set forth in the bill of exceptions, "*which shall be plainly and distinctly therein set forth.*" The bill of exceptions as originally drawn in this case, is in strict conformity with the Act. To allow the amendment would be to make the Act void and of none effect. And a surprise in this Court is the more detrimental because no continuance can be allowed on that account. The defendant, we repeat, had a right to conclude that the plaintiff, by excepting to two of the four grounds on-

ly, was satisfied himself, that the judgment of the Superior Court was right upon the other two.

So much upon the proposition to amend.

Ought the books of Wildman & Ganahl to have been admitted in evidence before the jury?

By the Act of 1843, *Cobb* 275, the books of all persons in the practice of any regular craft, are allowed to go to the jury, in proof of open accounts. If the practice of the Courts is evidence of what the law is, such was the law in this State before the passage of this Act. And we think Judge FLEMING put too limited a construction upon this statute. The word *craft*, as used in the Act, was confined by his Honor to some "manual occupation; some mechanic art in which the person practicing it may acquire and exhibit dexterity and skill." It means this, to be sure, but why so limit the Act?

On the contrary, we hold that any occupation which makes it necessary for books to be kept as the record of its transactions—the monuments of its daily business, as factories, foundaries, forges, glass-works, banks, factorage, no matter what, if books are required, *ex necessitate rei*, to be kept, these books are to be let in under the law. And if it be inquired for what purpose and to what extent? We say, for the same purpose and to the same extent that a merchant or shop-keeper's books are received in evidence. And that is to prove those matters, which appertain to the ordinary business of the concern, which require to be charged, and which in fact constitute its *res gestæ*.

But it is argued that this rule, broad as it is, does not let in *money* items. And perhaps, in candor, it must be yielded that the decisions in this and other States, especially in times past, rather sustain this doctrine. No such exception, however, seems to be established in England. No reported case from that country, is cited by Judge FLEMING in his opinion, or by counsel in the argument before this Court. In the na-

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ture of things, no such principle can be maintained. It would virtually repeal the Act of 1843.

The business of banking is confined almost entirely to money items. So of the books of factors and commission merchants. So of brokers. Large pecuniary advances are made by commission houses to planters, in anticipation of crops. The customer sends an order for a thousand dollars. It is forwarded and charged to the planter's account. True, the factor has the written order, but the cash advanced depends upon the evidence of his books.

Whatever doctrine may have obtained formerly upon this subject, the world is too much in a whirl, there is too much to be done in the twenty-four hours now, to allow of the particularity and consequent delay in the obtainment of receipts, &c., which might at one period have prevailed without prejudice. Corporations, the law says, can only act through their corporate seal. Inforce this doctrine now, and all monied corporations, at least, would be abolished. They draw and endorse bills, and perform through their cashier, or other official agents, all their functions, the same as individuals.

Take the case of a grocery merchant, in one of our towns. His customer gives him a verbal order to buy him a thousand pounds of fodder, or ten barrels of corn. It is done, and the money paid out for the produce, and charged to the customer's account. When this practice is universal over the State, are the books no evidence of these money items! He that so affirms, is a half century behind the age in which he lives. And to get up with it, he must forget the things that are behind and press forward, for it will never stop or come back to him. As soon try to roll back the sun in its daily journey from west to east.

After all, the evidence of books rests upon the character and credit of the keeper of them. Lay the foundation for their introduction, which was done in this case; that is, prove by those who have had dealings with them, that they keep correct books, and there is little mischief to be appre-

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hended. The credit system of the world, upon which the rapidly developing commerce and civilization of the world, so materially depends, I say this as contradistinguished from the cash system, rests mainly upon the foundation to which I have just referred. Policy, then, to say nothing of any higher motive, will prompt men to deal honestly. For otherwise they cannot deal at all. They destroy their own credit, which in ninety-nine cases out of a hundred, constitutes their whole capital.

For myself, while I am no transcendentalist, or believer in the perfectability of fallen, depraved human nature, still I must think, that this world has been sadly libelled—much more sinned against than sinning. There is still much left that is *honest* and that may be trusted. At any rate, let this and all other proof go to the jury for what it is worth.

The book of Wildman & Ganahl was at all times accessible to Shore. He was seen examining it. He never made any objections to its correctness. Dr. Cullen testifies that he had been an eye-witness to business transactions between Wildman and Shore; had seen Wildman pay Shore wages for himself and wife; had heard Shore ask Wildman for wages; Wildman would then open his Book of accounts, make out a check, hand it to Shore, and then proceed to charge it on Shore's account; that this was done repeatedly; that he had seen Wildman give Shore checks on the bank; Shore gave no receipt; that on the third of March, 1853, he saw Wildman pay plaintiff wages by giving him a check for the amount charged in the account of Shore of that date, that is \$20; that he had seen Wildman pay Shore at other times, but witness did not remember the dates or amounts.

We ask is all this not proof sufficient to let in the books? Does it not amount to an acknowledgment by Shore of their correctness? It is said that he was dependent upon his employers for his bread, and hence the motive for his silence. What! to read in the book the proof of his employers' villainy, that they were manufacturing false charges against him, and

to remain for some fifteen months or more in their service! Preposterous! Though not more so than the fact that these false charges were made and the book left exposed to the inspection of the party defrauded! Besides it not only appears from the evidence of Dr. Cullen, that the book was the best, but in truth, the *only* evidence in the possession of the parties of the payments made to Shore.

Again, where did Mr. Shore get the items for making out his account for wages, which he pleaded as a set-off, and which corresponds so precisely with the credits entered upon these rejected books of the plaintiffs? He got them from that very book, and no where else! The book was very reliable to charge Wildman & Ganahl, but not Mr. Shore! And that is not all. In transcribing his account to charge the plaintiffs, he is careful to allow no credit, with one small exception, except such as could be abundantly established by *aliunde* testimony! Tell me not of technical rules of evidence! They have excluded the light of day from the jury box long enough. Not only open wide doors and windows, but unroof the temples of justice, that all the rays of truth may beam brilliantly upon those who are set for the administration of the law. Right to the noble, martyred dead, as well as just rebuke to the living, alike demand it in this case!

Judgment reversed.

BENNING J., concurring.

MCDONALD, J. dissenting.

This cause comes before this Court on two assignments of error.

1st. That the Court erred in deciding that the book of accounts of Wildman & Ganahl was not admissible in evidence before the jury.

2d. That the Judge erred in deciding the account of Shore, in said book, was not admissible as evidence.

The members of this Court agree in sustaining the first assignment of error, and reversing the judgment of the Court below, on that ground.

By the Act of 1843, (*Cobb* 275,) physicians are allowed to sue for and recover judgment in the several Courts of law, in this State, on open accounts, in their favor, upon the production and proof of their books of account, in the same manner and on the same terms as is authorized by existing laws, in cases where tradesmen and merchants are parties plaintiffs in said Courts. Physicians may maintain private hospitals for their own convenience, and the benefit of their patients, and may keep books of account, not only of professional services rendered their patients, but also of proper and legitimate charges against their employees engaged in waiting on patients, and supporting the establishment.

I cannot concur in the judgment, however, so far as it admits, as a principle, the right of the physician to prove, by entries on his books, made by himself, although sustained by the usual proof that he keeps fair and correct books, that he has paid to his employees or others, the amount of his indebtedment to them.

I know of no rule which admits the books of tradesmen or merchants for any such purpose. In my judgment, the books are no evidence of such payment, no matter by whom kept, except in the single instance where the creditor keeps the books and makes the entries. If the party make the entry himself, it amounts to nothing more than his declaration that he has paid his debt. If a clerk or third person make the entry, it is only hearsay evidence. If the creditor himself make the entry, it is an admission that he has been paid the amount he has entered against himself. It is implied by the Act of 1843, that the books of merchants and tradesmen might be admitted to prove open accounts in their favor, under laws existing at that time.

There was no statute law under which they could be admitted. It is by no means established that the books, of

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themselves, were evidence at common law. *Sir William Blackstone* says, that the penners of the statute *7th Jac. 1 ch. 12*, which confines this species of proof (by the books,) to such transactions as happened within one year before the action brought, *seem to have imagined* that the books, of themselves, were evidence at common law. The same learned author declares, that books of account or shop books, are not allowed, of themselves to be given in evidence for the owner; but a servant who made the entry may have recourse to them to refresh his memory; and if such servant be dead, and his hand be proved, the book may be read in evidence; for as tradesmen are often under a necessity of giving a credit without a note or writing, this is, therefore, when accompanied with such other collateral proofs of fairness and regularity, the best evidence that can be produced. He remarks, farther, that this dangerous species of evidence is not carried so far in England as abroad. *3 Bl. Com. 368*

In *Lord Raymond*, 745, it is said, a man's book of accounts is no evidence for him, though it may be against him, for it cannot be better evidence than his own testimony, which is inadmissible.

The Act of the Legislature of 1811, in relation to Justice's Courts, declares, that neither the plaintiff nor defendant shall be permitted to prove his or her account, by his or her own oath, without first making oath in writing, that he or she has no other evidence whereby to establish the same, that is in his or her power to procure. *Cobb*, 642.

Again, the Act of 1842 declares, that neither of the parties shall be allowed to prove their accounts by their own oath, in any sum over thirty dollars. *Cobb*, 653.

Neither merchant nor tradesman can prove his own account in any sum over thirty dollars, and yet, it seems, that his mere entries in books kept by himself, a certainly much inferior grade of evidence, has been admitted to establish his accounts to an unlimited amount. The practice, in this regard, by our Superior Courts, and as affirmed by this Court,

certainly finds no warrant for it in our statutes, or the English common law. The decisions of the Courts of other States are no authority here. If the question were before this Court for the first time, in regard to the admission of merchants' and tradesmen's books as evidence, I should be strongly disposed to sustain the rule of evidence in the English Courts, as I understand it, to-wit: that where the entries are made by the plaintiff himself, they are inadmissible; when made by a servant, or clerk, they then might be used as memoranda only, to refresh his memory as to the sale and delivery of goods; and if he be dead, or if, for any cause, his testimony could not be obtained, that the next best evidence should be produced, proof of his hand-writing, and collateral proof of the fairness and regularity of the books.

I consider that question, however, as settled by the case of *Taylor vs. Tucker*, 1 *Kelly*, 231. The Court held, in that case, that the books of a party kept by himself, and, in that instance much less, an account kept on a loose piece of paper, by the party himself, with the additional proof that the party kept correct accounts, and that that was the only account kept by him, was sufficient evidence to entitle the party to recover an account for lumber sold and delivered. The Court there considered it a rule, *ex necessitate*, to accommodate small dealers who are unable to keep clerks.

Long before the establishment of this Court, the Judges of the Superior Courts adopted the same rule. A case of the sort decided in 1831, twelve years before the Act of 1843, *Martin vs. the adm'r of Fyffe*, is reported in *Dudley*, 16. The Judge before whom that cause was tried, remarks, that merchants' and shop-keeper's books are, by constant practice, received as evidence to prove the sale and delivery of goods, when it is shown that the books offered are of original entry, are in his hand-writing, that he keeps fair books, had had dealings with the person charged, and that he kept no clerk.

The learned Judge who pronounced that judgment said

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further, that the rule was an exception our Courts had found it necessary to make, for the cause of truth and justice, and for the relief of those amongst us whose business obliges them to extend credit, but who cannot afford to keep clerks. He repeats, that the testimony is only admitted in any case, as matter of necessity, arising from the want of better. Perhaps the Legislature regarded the constant practice of the Courts, referred to here, as evidence of the law in regard to merchants' and tradesmen's books of account, on the footing of which, by the Act of 1843, it placed the books of physicians. But the Courts then held, that to admit them, under the circumstances stated, was a departure from the rules of evidence, and that it was a rule adopted from the necessity of the case. The exception was made in favor of small dealers unable to keep a clerk, and who were obliged to extend a credit to their customers. The books in such cases were received as evidence of *the sale and delivery of goods, and not of money loaned, or of debts paid, nor of advances in money.* There can be no necessity for a rule of that sort. If a merchant has money to lend and he does it, he should take a note; if he owes a debt and pays the whole or a part of it, he should take a receipt; if a factor advances money for his consigner or other person, he should have an order, and evidence that he has remitted or applied it according to the order, which is always easily attainable. I think that the decisions of the Courts have gone quite far enough, in permitting a plaintiff to give his books, which are nothing more than hearsay, of his own fabrication, in evidence to prove the sale and delivery of goods. I cannot sanction a principle, which will allow a party to discharge a debt, *ad libitum*, by a mere entry on his book that he has paid it; or to make another his debtor for cash loaned to any amount, by such entry. I know of no rule of law or evidence that permits it. The book of the plaintiff was offered in this case to prove payments, and I think it was not admissible for that purpose.

But, it is said that the book was open to the examination of the defendant, and he was seen to examine it. He was steward, and it was no part of his business to keep the books. He had no power to correct erroneous entries. The witness does not testify that the defendant examined his own account as charged in the book, nor does he testify that the defendant's attention was called by the plaintiff to his account, or that the plaintiff was present when he was looking into the book.

To make the book evidence of the defendant's admission of the account charged therein against him, it should have appeared, either that his attention was called to the account therein by the plaintiff, that he examined and admitted it, or at least did not object to it; or that he had access to the book, and had authority to correct erroneous charges against him, that he saw them and did not correct them; or that he examined his account deliberately, and made no objection thereto when he saw the plaintiff.

There is no evidence in the record that the defendant did not object to the account when he saw the plaintiff. I think that the decision of the presiding Judge in the Court below, who reviewed the decision of the Judge of the City Court, was clearly according to law on this branch of the case, and that his judgment thereon should be affirmed.

ROBERT WISE, plaintiff in error, vs. THE STATE OF GEORGIA,
defendant in error. .

[1.] To entitle a party, who has been convicted of an offence, to a new trial on the ground that the bill of indictment was defective, he must have excepted to the indictment, at the time and in the manner prescribed in the statute, and the Court must have overruled the exception.

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- [2.] A verdict finding the prisoner guilty on a charge of larceny from the house, is not contrary to evidence when it is proved that the harness was left, in the evening, in a house, is missing the next day, is found in possession of the accused shortly afterwards, who does not account how he became possessed of it.
- [3.] The discovery of new and material evidence, after conviction, which was unknown to the party at his trial, and which he could not have known or produced by the use of any sort of diligence, is a good ground for a new trial.

Indictment, for larceny from house. Tried before Judge FLEMING, at May Term, 1857.

Robert Wise was indicted for stealing a set of harness belonging to Frederick A. Tupper, from the stable of Stephens & Elliston, in the city of Savannah.

Upon the trial, the following testimony was introduced on the part of the State :

Thomas F. Stephens, testified, "that he boarded Mr. Tupper's horse at his stable, his harness was also left with him. The stable was kept by him and Jacob Elliston, as Copartners, under the name of Stephens & Elliston. Every evening, before he left the stable, he always went around to see that every thing was right. Mr. Tupper came in between seven and eight o'clock, on the evening of the third of last July, and left his horse and harness. The next morning he came for his horse and harness, and on looking for the harness, he found it was gone. The harness was there the evening before. One of his boys told him the harness was gone, and on going and looking for it he found it was so. It was a buggy harness, and worth about forty dollars. Told his boy not to say anything about it. On next Sunday I told my son to go around and see if he could see anything of it. He was gone about twenty minutes, when he came back and said he had seen part of the harness. He asked him where it was ; he told me, and going there I found it on a roan horse, formerly belonging to him, which the prisoner was driving in a funeral procession. He took Mr. Russell and

went after him, and had him arrested, and carried him to the guard house. He asked prisoner, at the guard house, where the balance of the harness was; he said, he did not know, that he had got the harness which he had, from his (witness's) boy, Lloyd. Prisoner had traces, bridle, hames and collar. The collar had a peculiar mark on it, which enabled him to indentify it. Prisoner said he knew nothing of the balance of the harness. Prisoner said that his boy Lloyd brought the harness to him, between nine and ten o'clock on the night of the third of July and lent it to him. Boy, Lloyd, went out in a carriage, about five o'clock in the evening, and came back a few minutes before twelve o'clock. The next day after he had prisoner arrested, he went to him and told him he wanted to get the balance of the harness, and told him if he would prove it on his boy Lloyd, he would not prosecute him. The prisoner then wrote him an order for the balance of the harness, while in Mr. Russel's office. It was in a shop near the gas works, kept by Mr. Larkin. He went there and found the balance of it. This took place in Savannah, in the County of Chatham, in the State of Georgia. Harness was the property of Frederick A. Tupper."

On his cross examination, witness said: "He had several boys in his employ. Had lost articles from his other stable. Did not see prisoner in the neighborhood of the stable the night the harness was taken. He went home and came back about ten o'clock and staid there until after 12 o'clock. He first saw the harness at the funeral. There were carriages and harness from his stable at the funeral. Boy Lloyd was in the habit of passing between his two stables."

Frederick A. Tupper testified: "That he left his horse and buggy at Stephens & Ellison's stables on the 3d July last. He bought the harness of William H. May, and paid him fifty dollars for it. His harness was also at the stable. He was in the habit of leaving it at the stable. Was told it was stolen. First saw it at the barracks or a portion of it; saw the other portion at Mr. Larkin's store, near the gas

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works, which Mr. Stephens got. He identified the harness as his."

Here the testimony closed.

Counsel for prisoner, contended that neither of the witnesses proved that the harness was stolen at all, or that the prisoner ever entered the house from which said harness had been removed. That the confession of the prisoner, as to how he got possession of the harness was invoked and given in as part of the State's evidence, viz: "That he had borrowed the harness from a slave named Lloyd, the property of Thomas F. Stephens, and that the indictment did not sufficiently charge the offence.

The jury found the prisoner guilty. Wherefore his counsel moved for a new trial on the following grounds:

1st. Because the verdict was contrary to law.

2d. Because the verdict was contrary to evidence.

3d. Because since his trial, the prisoner has discovered new and material evidence of which he had no knowledge until after his trial, and which no effort on his part could have procured.

The presiding Judge refused the motion for a new trial, and counsel for prisoner excepts.

The following affidavits were filed in support of the motion for a new trial, on the ground of subsequently discovered evidence:

THE STATE,

vs.

ROBERT WISE,

In Chatham Superior Court,

May Term, 1857.

Indictment : Larceny from the house.

Verdict :

Motion for New Trial.

Personally appeared, before me, William Clark, who, being duly sworn, deposes and says, that he was at the bar room

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of Robert Wise, the defendant, on the night of the third of July, 1856, between the hours of nine and ten o'clock. That during the time he was in said bar room, a negro boy slave, named Lloyd, the property of Thomas F. Stephens, came in with a harness, which he put upon the counter, and which, he said, he loaned to said Wise, to be used the next day. That the conversation, which passed between the said boy Lloyd and the said Wise was in reference to the loan of the harness, to go to a funeral. That the said Wise promised the said slave Lloyd to return the harness as soon as he had used it, which was to be for a few hours the next day. deponent has not seen said Wise since, having left the State soon after, and only returned on Friday last. That deponent has had no opportunity to communicate with the said Wise, or his counsel. That since the conviction of the said Wise, of which the deponent has just been informed, he made a communication of the foregoing facts to his friends, deponent not knowing before that he had been prosecuted.

his
(Signed,) WM. ✕ CLARK.
mark.

Sworn to, before me, this 17th June, 1857.

(Signed,) PHILIP M. RUSSELL, J. P

Personally appeared before me, Arthur Walsch, who being duly sworn, deposes and says, that he was in the employment of Stephens & Elliston, in July, 1856. That he was at their stable on the third of July of said year, and slept there that night, and the harnesses were put away that evening. That Stephens & Elliston kept severe dogs tied at the doors, and that no stranger could enter the stable without those within being alarmed. That deponent saw the negro man Lloyd, that evening, in the room where the harness was. That said Lloyd was a negro of very bad character, and was sent away on suspicion of burning the stable. That depo-

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ment is not acquainted with Robert Wise, and has only made the above facts known since the trial.

his
(Signed,) ARTHUR ✕ WALSCH.
mark.

Sworn to, before me, this 20th June, 1857.

(Signed,) PHILIP M. RUSSELL, J. P.

Personally appeared, before me, James Larkin, who being duly sworn, deposes and says, that in July, 1856, he loaned his horse and buggy to Robert Wise, the defendant, to go to a funeral. That deponent's harness was not fit for use. That said Wise stated that he had borrowed a harness, and brought it to deponent's stable. That the said harness proved too large for deponent's horse, and deponent was about to bore a hole in the strap connecting the crupper, so as to make it fit, when said Wise objected, saying it was a borrowed harness. That deponent then made use of a part of his wagon harness, and that portion of the harness not used, and brought by Wise, was left at deponent's house. That deponent was subpœnaed on the part of the State, but was not sworn as a witness. That deponent never communicated to the said Wise, or his counsel, what facts he could prove, until after his trial, when the State declined to swear him, he, deponent believing that his testimony would be against the said Wise, and in favor of the State.

(Signed,) JAMES LARKIN.

Sworn to, before me, this 19th June, 1857.

(Signed,) PHILIP M. RUSSELL, J. P.

Personally appeared, before me, Robert Wise, the defendant, who, being duly sworn, deposes and says, that since his trial and conviction he has discovered three witnesses, viz: William Clark, James Larkin and Arthur Walsch, whose testimony is material, and if he had known of such witnesses would have procured their testimony on his trial. That de-

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ponent had no knowledge that said persons could establish what was sworn to by them, until after his trial. That William Clark, who states he was present, at his bar-room, on the night of the third of July, 1856, was a non-resident, and has been out of the State ever since, and has returned to Savannah but a few days since, and that deponent had no opportunity of knowing that his testimony would be material to him, or he would have endeavored to continue his case. That deponent did not know of any testimony material to his case, which could be given by James Larkin and Arthur Walsch, the latter this deponent has no acquaintance with. That deponent, or his counsel, were not apprised of these witnesses until after his trial, but have been discovered since, and that, had he known before of the existence of such testimony, as the said witnesses have given under affidavit, he would have procured their attendance or have moved to postpone his trial.

(Signed,) ROBERT WISE.

Sworn to, before me, this 18th June, 1857.

(Signed,) LAURENCE CONNELL, J. P.

LEVI S. D'LYON, for plaintiff in error.

SOL. GEN'L, for defendant in error.

By the Court—McDONALD, J. delivering the opinion.

after conviction, moved in the Court
on three grounds :

1. That the verdict was contrary to law.

2. That the verdict was contrary to evidence.

3. That, at the trial, the prisoner has discovered new evidence, which he did not know of at the time, and on his part could have procured.

The motion in this motion is predicated on the ground that the indictment does not sufficiently charge

the offence of larceny from the house. No objection appears to have been made to the indictment until after conviction. All exceptions which go merely to the form of the indictment, must be made before trial. *Cobb* §33. *Penal Code, Par.* 295. If the prisoner on being arraigned, shall demur to the indictment, the demurrer must be made in writing. *Ib. Par.* 304. If the indictment be defective, the party is not entitled to a new trial, on that account, under the Act of 1854, unless he made his exception to it in the time, and in manner pointed out by statute. The presiding Judge should overrule every exception not made in this manner; and it is only in cases when the exception is *illegally* overruled, that the Act requires the Court to grant a new trial to the applicant.

But the indictment in this case is substantially and almost literally in accordance with the statute.

[2.] It is insisted that the verdict is contrary to evidence, and that the Court ought, on that account, to have granted a new trial.

The harness had been deposited in the stable from which it was stolen on the third of July. On the morning of the fourth, it was gone, and on Sunday, a part of it was found in possession of the prisoner. It became his duty, then, to account for the possession, to repel the presumption of his guilt. His exculpatory statements at the time, that a part of it was found on him, and subsequently, were submitted to the jury. They were at liberty, according to the credit that they should think them entitled to, to give faith to them, or disregard them entirely. They did the latter, and were fully justified by his denial of all knowledge of a part of the harness, not on the horse when he was detected, and his almost immediately giving an order for it, to Larkin, in whose possession it was found.

[3.] In support of the ground, that since the trial the prisoner had discovered new and material evidence, his own affidavit and the affidavits of William Clark, Arthur Walsch and James Larkin are submitted to the Court. The affidavit

of James Larkin is not insisted on. The evidence of Arthur Walsch, as set forth in his affidavit furnishes but slight evidence of the innocence of the prisoner. However strong it might be, or of whatever value, it is very certain that by the use of the least diligence, he might have informed himself of it. He made no inquiry, at the stable, of the owners, or employees, to ascertain the manner that the harness was taken, or the difficulties and dangers a stranger would encounter, in entering the stable to commit a theft.

The affidavit of William Clark, is entitled to more consideration. He states that he was in the bar-room of the prisoner on the night of the 3d of July, 1856, when a negro boy slave named Lloyd came in with a harness, which he said he loaned to prisoner to be used the next day. Witness left the State soon after, and returned on the Friday before he made the affidavit. The prisoner deposes that he had no knowledge that the persons making these affidavits could establish the facts sworn to by them until after his trial; and while it is apparent that, by the use of common diligence, he could have informed himself of the proof which could be made by Larkin and Walsch, it does not appear that he could, by the use of any sort of diligence, have known that Clark knew the facts deposed to by him. He does not depose that Clark was in his bar-room on the night the harness was carried there, but to the statement of Clark that he was there. It is not probable that he could remember every person who passed in and out of a place of so frequent resort as that where the harness was carried. We will not undertake to pass upon the value of Clark's evidence to the defence of the prisoner in another trial. It is apparently material to it, and the prisoner does not seem to have been guilty of negligence in not producing it on the former trial, and on that ground, therefore, the judgment of the Court below is reversed.

Judgment reversed.

Roberts vs. Boylan.

HIRAM ROBERTS, plaintiff in error, vs. **MICHAEL BOYLAN**, defendant in error.

- [1.] A deed of assignment for the benefit of creditors, conveying all the property of the debtor, and then setting forth specially, certain slaves by value without further saying, "all other slaves not mentioned," or not "remembered," or other equivalent words, conveys only the negroes whose names are mentioned in the deed.
- [2.] The title of a purchaser at Sheriff's sale, depends on the lien of the judgment on the property which he purchased.
- [3.] A Court of Equity will sustain a purchase at Sheriff's sale, against an assignee for the benefit of creditors, of the property purchased, when the purchaser has committed no fraud, and is without fault, and the debtor and creditor have had the full benefit of the proceeds of the sale, especially, when it does not appear that the proceeds of the sale of property assigned, was paid to the creditors, and there was a deficiency.

Trover, in Chatham Superior Court. Decision on special verdict, by Judge **FLEMING**, at May Term, 1857.

This was an action of trover, brought by **Hiram Roberts**, against **Michael Boylan**, for the recovery of a negro woman, slave, named **Mary**.

By consent of counsel, the jury found the following special verdict:

Hiram Roberts vs Michael Boylan, Chatham Superior Court, January Term, 1857.

We find that the negro woman, slave, named **Mary**, the subject matter of this suit, was by a bill of sale, duly made and executed by **Joseph Story Fay**, on the ——— day of ———, eighteen hundred and fifty-one, conveyed to Mrs. ——— Short, the wife of **Adam Short**. That on the 26th day of April, eighteen hundred and fifty-five, **Adam Short** being insolvent, made and executed a deed of conveyance to **Hiram Roberts** of all his property, for the benefit of all his creditors. That in the said deed of assignment, a number of negroes were mentioned and named. This negro woman was not named in the said deed of assignment. That all the negroes mentioned and named in the said deed of assignment

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were taken possession of by the said Hiram Roberts, and after having been duly advertised, were publicly sold at the door of the Court House for the benefit of the creditors of the said Adam Short. That the negro woman slave, the subject matter of this suit, was not taken possession of by Hiram Roberts, but was left in the possession of the said Adam Short. That some time after the execution and record of the assignment, judgment was obtained against Adam Short, on the ——— day of ———, eighteen hundred and ——— judgment having been obtained in the City Court in favor of ——— against the said Adam Short, under an execution founded thereon the Sheriff of the City of Savannah levied upon the said negro woman slave, whom he found in the possession of the said Adam Short. That Hiram Roberts was notified of the said levy, and failed to put in a claim, but requested the Sheriff to leave the negro woman slave in the possession of the said Adam Short, and that he would be responsible for the forthcoming of the property at the time and place of sale. That after the same had been duly advertised for sale, the property was on the first Tuesday in February, eighteen hundred and fifty-six, produced at the court house by the said Adam Short, and was put up by the Sheriff at public sale. That Hiram Roberts was in the city of Savannah, and knew of the time and place of sale, but was not present at the sale, and gave no notice of any claim which he had to the said property. That Adam Short was present at the time and place of sale, and gave notice that the property was not his property, and a purchaser would buy at his y being put up for sale, the said Adam id property, and Michael Boylan best bidder, the said property was knocked for the sum of four hundred and sixty s paid by him in cash to the Sheriff, l over to the executions and judgments Short, according to their legal priority. the said negro woman slave to be

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four hundred and sixty dollars, and her annual hire, seventy-two dollars. We find a demand made by the plaintiff, and a refusal made by the defendant.

If, upon the foregoing state of facts, the defendant is entitled to hold the negro woman slave in a Court of Law or in a Court of Equity, then we find for the defendant.

If not, then we find for the plaintiff the sum of four hundred and sixty dollars, the value of the said negro woman slave, and the sum of seventy-eight dollars for the hire of the said negro woman slave. The sum of four hundred and sixty dollars to be discharged if the negro woman slave is delivered to the plaintiff by the defendant within thirty days after the decision of the Court is filed.

T. H. KREEGER, Foreman.

May 12th, 1857.

On motion and by consent, it is ordered that the legal questions on the above case, be argued at chambers, on five days notice to either party, and that judgment upon the decision of the Court, be entered up as of this term.

June 22d, 1857.

Afterwards, and after argument, his Hon. W. B. Fleming, pronounced his decision and ordered judgment to be entered for defendant.

To which decision, counsel for plaintiff excepted, on the following grounds :

1st. Because his Honor erred in deciding that the defendant was entitled to judgment.

2d. Because his Honor erred in deciding that the assignment from Short to Roberts did not convey the title of said slave to Roberts.

3d. Because his Honor erred in drawing inferences with reference to said assignment, not specified in the verdict.

4th. Because his Honor erred in holding that legal fraud might be inferred by the Court from the retention of posses-

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sion by Short after the assignment, no such fact having been found by the jury.

5th. Because his Honor erred in holding, that the acts of Roberts with reference to the sale of said slave, and his allowance thereof were such as to preclude him from the assertion of his rights against the defendant as purchaser at Sheriff sale.

LLOYD & OWENS, for plaintiff in error.

WARD, OWENS & JONES, for defendant in error.

By the Court—McDONALD, J. delivering the opinion.

[1.] The conveyance executed by Fay to Mrs. Short, vested the title in her husband, Adam Short. Adam Short being insolvent, conveyed to Hiram Roberts all his property for the benefit of all his creditors. The jury do not, in their verdict, set forth the deed of assignment, but they find that a number of negroes were mentioned and named in it, and that the negro woman Mary, was not named among them. The jury further find, that Hiram Roberts took possession of all the negroes mentioned and named in the said deed, and duly advertised and publicly sold them, at the door of the Court House, for the benefit of the creditors of Adam Short. He did not take possession of the negro woman Mary, but left her in the possession of the said Adam Short. The jury do
 d by the deed of assignment.
 tents of the deed of assign-
 their verdict, however, the
 d in the deed, but content
 Mary's name is not among
 y have appeared negatively,
 We hold, therefore, that, al-
 s general, of "all his proper-
 of a number of negroes by
 it, negroes who were not

named. There are no general words at the close of the enumeration, such as, "and all other negroes not mentioned," or "remembered," to give operation to the deed as a conveyance of all that kind of property. The specification is restrictive of the general words. The parties themselves so construed the instrument, for Roberts took possession of all the negroes named, and advertised and sold them. He did not claim Mary, although he had ample notice that she had been levied on, and he had every opportunity to claim, which is strong evidence, of itself, that he did not feel at liberty to make the necessary affidavit.

[2.] The claim of the defendant, is through the lien of the judgment creditor, whose execution was levied on Mary, and the title not having passed out of Roberts by deed of assignment, it follows that he purchased the title of Short, the debtor, which, for ought that appears in the record, was a good one. But the conveyance as between Short and Roberts, may have been good and valid, and yet, upon the facts found by the jury, the judgment lien of the creditor, may have attached to the property. It makes no odds that Roberts was assignee for creditors. Such assignments are not always exempt from fraud as to creditors, and like all other assignments, their validity must be tested by the principles of law applicable to their circumstances. The title of the defendant, as we have said, depends on the lien of the judgment under which he purchased. The negro woman Mary, was found in possession of the defendant, Short. The conveyance, under which the plaintiff claims, is an absolute conveyance, Mary is not named in it. She was left by the assignor, in the possession of the defendant. The jury find nothing in their verdict, explanatory of this continued possession. Without an explanation, the right of the judgment creditor to have his debt satisfied from the property, is perfect, and the plaintiff is concluded. 8 *Ga. Rep.*, 556. This would have been so had he claimed the property, and it is equally

so, if he has elected not to claim, but to sue the purchaser for the property.

[3.] In another view of this case, the plaintiff cannot recover. The jury find, that if, upon the facts found in their verdict, the defendant is entitled to hold the negro woman slave, in a Court of Law or *in a Court of Equity*, then they find for the defendant. The property specified in the deed of assignment, was conveyed to the plaintiff, in trust, for all Short's creditors. He sold the property of which he took possession, and most assuredly, a Court of Equity would not allow him to recover, even from the debtor, property conveyed by the deed, and by him left in his possession, without accounting for the property which he confessedly received and sold. The verdict finds neither the amount of Short's debts, nor the amount of the proceeds of the sale, which went into the hands of the assignee, nor the distribution of the fund. It is not enough to say, that the record shows unsatisfied judgments, *non constat*, that if the property conveyed had been all sold and the proceeds applied according to the trust, there would have been unsatisfied judgments. But the verdict finds that Mary was sold for her value, that the money was paid and applied to the payment of executions and judgments against Short, according to their legal priority. The jury does not find that this payment was not in accordance with the stipulations of the deed of assignment. The debtor and the creditors have had the full benefit of the sale of this property, and there is no equity against the purchaser who has paid full value, nor in favor of the debtor or his creditors who have received the full value of the property. But, if the proceeds of the sale of the property were applied differently from the terms of the assignment, *a Court of Equity* would not allow a purchaser who was guilty of no fraud, and was without fault, to be prejudiced thereby. The facts were all known to the assignee, he knew of the sale and, of course, that the money went into the hands of the officer, and that being in the custody of the law, it was

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subject to the order of the Court. He ought to have applied, then, for the distribution according to the agreement of the debtor and his creditors, as evidenced by the deed of assignment, if, according to that agreement, it was distributable differently from the manner the law would distribute it.

Upon the facts found by the jury, therefore, the defendant, in our judgment, is entitled to hold the negro woman slave Mary, according to the principles, both of law and equity, which apply to the case, and the judgment of the Court below is affirmed.

Judgment affirmed.

VIRGINIA COPE, plaintiff in error, vs. **THE SAVANNAH MUTUAL LOAN ASSOCIATION**, et al. defendant in error.

Deeds of mortgage are not included in the word conveyances, of the Act of 1826, to amend an Act. "to enable feme coverts to convey their estate."

Petition for dower, in Chatham Superior Court, Decision by Judge Fleming, August, 1857.

This was an application by Mrs. Virginia Cope, the widow of John L. Cope, deceased, for dower in the real estate of her late husband, situated in the city of Savannah.

The application was resisted and traversed by the Savannah Mutual Loan Association, and the Oglethorpe Mutual Loan Association.

By consent of counsel, the jury rendered the following special verdict:

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In the matter of the application of VIRGINIA COPE, widow of JOHN L. COPE, deceased, for dower. } In Superior Court, Chatham County.

We, the jury, find that on the fifth day of December, eighteen hundred and fifty-two, the said John L. Cope, being then seized of a lot of land in the City of Savannah, County of Chatham, and State of Georgia, known in the plan of said city as Lot number (13) thirteen, New Franklin Ward, the same being what is commonly called a city lot, and subject to an annual ground-rent of two hundred and twenty-five dollars and twelve cents, payable to the Mayor and Aldermen of the city of Savannah and the Hamlets thereof, was married to the said applicant; that the said John L. Cope, afterwards mortgaged the said lot of land to the persons, at the times, and for the amounts following, to wit: to John N. Lewis, treasurer of the Savannah Mutual Loan Association, by deed dated the fourteenth day of December, eighteen hundred and fifty-two, for the sum of two thousand eight hundred and ninety dollars; to the said John N., treasurer as aforesaid, by deed dated the ninth day of January, eighteen hundred and fifty-four, for the sum of two thousand dollars; to the said John N., treasurer as aforesaid, by deed dated the thirteenth day of March, eighteen hundred and fifty-four, for the sum of one thousand dollars, and to John N. Lewis, treasurer of the Oglethorpe Mutual Loan Association, by deed dated the eleventh day of April, eighteen hundred and fifty-four, for the sum of two thousand dollars; that the said John L. Cope died intestate on or about the day of eighteen hundred and fifty-four, in possession of the said lot, but subject to the mortgages aforesaid; that letters of administration on the estate of the said intestate were granted to John N. Lewis; that the said first mentioned three mortgages were assigned by the said John N. Lewis, treasurer as aforesaid, to the said Savannah Mutual Loan Association, and the said last mentioned mortgage was assigned

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by the said John N. Lewis, treasurer as aforesaid, to the said Oglethorpe Mutual Loan Association; that the said assignees, afterwards, in the Court, proceeded to foreclose the said mortgages, and rules absolute and judgment were rendered thereon in favor of the said assignees, respectively, to wit: in favor of the Savannah Mutual Loan Association on the said first three mortgages, for the sum of five thousand and five hundred and fifty-five dollars, with interest from the twelfth day of March, eighteen hundred and fifty-five, and twenty-three dollars and fifty cents for costs of foreclosure, and in favor of the Oglethorpe Mutual Loan Association, on the said last mentioned mortgage, for the sum of one thousand eight hundred and two dollars, with interest on one thousand seven hundred and eighty-one dollars from the fourth day of April, eighteen hundred and fifty-five, and twenty-three dollars and fifty cents for costs of foreclosure; that writs of fieri facias, in execution of the rules absolute and judgments, were issued and levied on the said lot of land, and that the same was duly and legally sold, by virtue thereof, for the sum of three thousand dollars, public notice of the claim of dower having been given at the time and place of sale, and that said lot is now the property of the Savannah Mutual Loan Association and the Oglethorpe Mutual Loan Association.

If, in the opinion of the Court upon the foregoing facts, the applicant is entitled to dower in the said lot of land, then we find for the applicant; otherwise, we find for the traversers.

J. STODDARD, *Foreman.*

Savannah, May 28, 1857.

Whereupon, after argument, the presiding Judge, ordered judgment to be entered for traversers.

To which decision counsel for Mrs. Cope excepted, upon the following grounds:

1st. That the Court erred in deciding that the term "con-

veyance" in the Act of 1826, included mortgages, so as to deprive a wife of dower in lands mortgaged by her husband, such mortgage not being foreclosed, *until after the death* of the husband.

2d. Because the Court erred in deciding that under the Act of 1826, the wife's right to dower does not attach at the time of the marriage, except as to property derived through her, but is postponed to the death of the husband.

3d. Because the Court erred in deciding, that under the facts in this case, the applicant was not entitled to dower in the mortgaged premises.

WARD, OWENS and JONES, for plaintiff in error.

HARDEN & GUERARD; LAWTON & BASSINGER, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Mr. Cope mortgaged the lands in question to the assignors of the defendants in error. His widow, Mrs. Cope claims dower in the lands, and insists, that her right to such dower, is not affected by the mortgages.

Is she right in this? The Court below held that she is not.

All depends on whether deeds of mortgage are included in the word, "*conveyance*," used in the Act of 1826, to amend an act "to enable *feme coverts* to convey their estates. *Cobb's Dig.* 171.

These are the words of that act; "that from and immediately after the passing of this act, all conveyances, of lands and tenements, made by the husband alone during the coverture, shall be legal and valid, and effectually convey the entire premises therein described," &c.

There is little risk in assuming, that the word, "*conveyances*," in this Act, has the same meaning which it has, in the other Acts *in pari materia* with this act.

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Of these, the most important, perhaps, is the Act of 1760, which this Act amends.

The first section of that act, is as follows: "that all alienations and conveyances whatsoever, which have at any time, heretofore, in this province been made, either by husband and wife having jointly signed a deed of conveyance before witnesses, or by the acknowledgment of the wife of her consent to such a sale of lands and tenements," &c. "shall" "be" "good and effectual against the husband and wife," &c.

Here, it is clear, that the words, "a sale," restrict the words, "alienations and conveyances," to such alienations and conveyances, as grew out of *sales* of the lands. *Mortgage* deeds do not grow out of *sales*; they grow out of loans or other debts.

This section is retrospective. The second section is prospective. It also uses the word, "conveyances," and the word, "sale;" and in a manner similar to that in which they are used in the first section.

The word, conveyances, then, in this Act of 1760, does not include deeds of mortgage. *Cobb's Dig.* 161.

The Act of 1755, "to prevent fraudulent deeds of conveyance," the first act of Georgia, on the subject of conveyances, if not on any subject, contains, in its first section, these words: "That all conveyances of lands, tenements, negroes, and other chattels, or hereditaments whatsoever, or mortgages of the same," "shall be registered," &c. Conveyances *or* mortgages, would seem to imply, that conveyances were considered things of one class; mortgages things of another. *Cobb* 159.

There is more to the same effect, in sections two and four.

The Act of 1785, on the same general subject. has this preamble:

"*Whereas*, many deeds of bargain and sale, and other deeds of feoffment or conveyance, have been made, which have not been enrolled, or livery and seizin had, or may be

deficient in point of form, when it was the legal intent of the party to sell and lawfully convey the same."

Here again are words of sale—"to sell." These must restrict the word, conveyance, so as to prevent it from including mortgages. *See, too, section five.*

In 1827, we find the Legislature passing an Act especially for the recording of mortgages; and saying, by way of preamble to the Act; "whereas it is doubted, if there be any law of force in this State, requiring deeds of mortgage to be recorded." *Id.* 171. If the word, conveyances, used in the previous Acts to which I have referred had been thought to include mortgages, could this doubt any more have arisen as to mortgages, than as to other deeds?

In section three, this Act has, "deed of conveyance or mortgage," as two things.

The last general Act of registration, is entitled; "An Act to admit, certain deeds to be recorded," &c. The word used in the body of the Act is also "deeds." The term prescribed, is twelve months. Yet nobody has supposed, that this repeals the part of the Act of 1827, which requires *mortgage* deeds to be recorded within three months. *Id.* 175.

The Act of 1768, "to prevent fraudulent mortgages and conveyances," is in perfect harmony with these Acts, as it regards the sense in which this Act uses, the word, "conveyances." The Act speaks of "deeds of sale, mortgages, or conveyances," as though it meant, that mortgages were to be considered a class by themselves.

It is true, that in the proviso, which makes the third section of the Act: these are the words, "who did not legally join with her husband in such mortgage, or otherwise lawfully bar or exclude herself from such, her dower or right."

But these words may well refer to the common law modes of barring dower, viz. by fine or common recovery, or by the acceptance of a jointure, in lieu of dower.

We think, then, that the word, conveyances, in the Act of

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1826, does not include deeds of mortgage; and, therefore, we think the judgment of the Court below, was erroneous.

Judgment reversed.

EDWARD S. KEMPTON, et al, plaintiffs in error, vs. MORRIS L. HALLOWELL & Co., defendants in error.

In a marriage settlement the property was settled in trust among other things, to and for the joint use of the wife and the husband "during their joint lives, but not to be subject, in any way or manner, to the debts, contracts, or engagements," of the husband.

Held, [1st.] That the joint estate thus created in the wife did not, by the marriage, pass to the husband, but remained the wife's.

[2.] That her power over the estate was so restricted, that she could not, by endorsing her husband's debts, subject the estate to those debts.

[3.] If the interest of the husband is such under a marriage settlement, that it cannot be seized and sold at law, to satisfy debts against him, without prejudice to the interests of the other parties who take under the settlement, there is a case for equity.

In Equity, in Chatham Superior Court. Decision on demurrer, by Judge FLEMING, at chambers, August, 1857.

This was a bill filed by Morris S. Hallowell & Co., against Edward S. Kempton, and Anna Virginia Kempton, his wife, and John N. Lewis, trustee, to subject the trust estate created by the marriage settlement executed between Kempton and wife, before marriage, to certain promissory notes signed by Kempton, and endorsed by his wife, to complainants.

The bill alleges, that Edward S. Kempton and Anna Virginia Daughtry intermarried in 1845. That said Anna being possessed of a considerable estate, a marriage settlement was executed, by which she conveyed to Bartholomew Busby, as trustee, all her estate, to hold the same in trust for the joint

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use of herself and intended husband, during their joint lives, but not to be subject to the debts or contracts, control or engagements, of the said Edward S., and to and for the use of the survivor for life, and after the death of the survivor, then to the issue of the marriage, and if no issue, then in fee to the survivor.

The bill further states, that about 11th December, 1854, the said Edward S. Kempton made six promissory notes, amounting in the aggregate to about \$2,800 00, payable to the order of the said Anna Virginia Kempton, who endorsed and delivered the same to complainants, and which said notes have not been paid, either by said Edward S., the maker, or by the said Anna Virginia, the endorser.

The bill further charges, that Mrs. Kempton endorsed said notes with the intention to make the same a charge upon her estate, created in and by said marriage settlement, and said endorsements were so accepted by complainants, and that the interest of said Edward S. and his wife in said estate, is liable and subject to the payment and satisfaction of said notes. That said Edward S. has no property or estate other than the interest he may have in the property mentioned in said settlement, and beyond this he is insolvent.

The bill further states, that John N. Lewis has been substituted trustee in the place of Busby.

The bill prays, that the amount of said promissory notes on the property mentioned in said settlement, and that complainants have execution interest of said Edward S. and wife, at said trustee be decreed to pay the said estate to complainants, until said debt is paid, and upon his failure so to do, that said trustee, who shall take charge of said estate, until said notes be fully paid out of the same, be decreed to do so.

And the bill further prays, that a marriage be decreed between the parties of the first and second

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parts, and conveying the estate to Bartholomew Busby, declares that he shall hold the same: "In trust, nevertheless, to and for the sole use, benefit, and behoof of the said Anna Virginia, until the marriage shall take place, and from and immediately after the solemnization of said intended marriage, to and for the joint use and benefit of the said Anna Virginia and Edward S., during their joint lives, but not to be subject in any manner to the debts, contracts, or engagements of the said Edward S., and to and for the use, benefit, and behoof of the survivor of the said Anna Virginia Daughtry and Edward S., and to and for the use, benefit, and behoof of the survivor of the said Anna Virginia Daughtry, and from and after the death of the said survivor, then on trust, that the said Bartholomew Busby, his executors, administrators, or assigns, will deliver the same to the issue of said intended marriage, share and share alike, free from any trust. But if the said Anna Virginia should die in the lifetime of the said Edward S., her said intended husband, without leaving any issue living at the time of her death, then in trust, that the said Bartholomew Busby, his executors, administrators, or assigns, will transfer and deliver over to the said Edward S., all the property and estate herein contained and conveyed, free from any trust, and it is understood, covenanted, and agreed, by and between the parties to these presents, that it shall and may be lawful for the said trustee, or any trustee who shall or may be appointed in lieu of said Bartholomew Busby, to bargain, sell, or dispose of any or all the said property, present or future, upon the wish and approbation of the said Anna Virginia, and Edward S., and the survivor of them, which said approbation shall be signified in writing, investing, preserving, and disposing of the proceeds of said sale or disposal, upon the uses and trusts hereinbefore mentioned."

Dated 4 Dec., 1845.

To this bill, defendants filed a general demurrer, which,

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after argument, the Court overruled, and counsel for defendants excepted.

BACON & LEVY, for plaintiffs in error.

LLOYD & OWENS, for defendants in error.

By the Court.—BENNING, J. delivering the opinion.

The object of the bill, is to subject the property mentioned in the deed of marriage settlement, to the payment of the notes of Kempton, endorsed by his wife to the complainants.

The bill was demurred to for want of equity, and the demurrer was overruled.

Ought the demurrer to have been overruled? In other words, was there equity in the bill?

If the deed created a property or estate in the wife, which did not, on marriage, pass to the husband, but remained the wife's, and if, by endorsing his notes, she bound this property or estate, then there was equity in the bill. This may be assumed.

And even if the deed created no such property or estate in the wife, but yet created such estates in the husband, and in the remainder-men, that the estate of the husband could not be reached at law without prejudice to the estate of the remainder-men, then, too, there was equity in the bill. This, also, may be assumed.

First then, did the deed create any estate in the wife, which, on the marriage, did not pass to the husband, but remained the wife's?

The words of the deed, bearing on this point, are these :

“In trust, nevertheless, for the sole use, benefit, and behoof, of the said Anna Virginia, until the marriage shall take place; and from and immediately after the solemnization of said intended marriage, to and for the joint use and benefit of the said Anna Virginia and Edward S., during their joint lives, but not to be subject, in any manner, to the

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debts, contracts, or engagements, of the said Edward S.; and to and for the use, benefit, and behoof, of the survivor of the said Anna Virginia Daughtry and Edward S.; and from and after the death of the said survivor, then, in trust, that the said Bartholomew Busby, his executors, administrators, or assigns, will deliver the same to the issue of the said intended marriage, share and share alike, free from any trust. But if the said Anna Virginia should die in the lifetime of the said Edward S., her said intended husband, without having any issue living at the time of her death, then, in trust, that the said Bartholomew Busby, his executors, administrators, or assigns, will transfer and deliver over to the said Edward S., all the property and estate, herein contained and conveyed, free from any trust."

The property, from and after the marriage, was to be held for the "joint use" of the husband and wife, but so, as "not to be subject, in any manner, to the debts, contracts, or engagements," of the husband.

The effect of the words "joint use," was, to create an estate in the husband, and also an estate in the wife, and to make these two estates joint; the effect of the other words was to fix, in the wife, the estate created in her, and to prevent it from being, by the marriage, taken out of her, and passed into the husband. The whole effect of both sets of words, taken together, was to make her, and her husband, hold, as they would have held, if they had not been husband and wife.

The words "not to be subject, in any manner, to the debts, contracts, or engagements," of the husband, can operate so far as the estate created in the *wife* is concerned; although it may be true, that they cannot operate so far as the estate in the husband is concerned. And if they are to have any operation whatever, it must be an operation by which the estate in the wife, is to be *hers* and not *his*, although it may be, that she may have to hold it *jointly* with him, in other words, it must be an operation by which, though she is to

have, not an estate, in severalty, as contradistinguished from the estate in joint tenancy, yet, by which she is to have an estate in severalty, as contradistinguished from the ordinary estate in the wife which by marriage merges in the husband. This is the least operation the words can have, if they are to have any. This operation, then, we think the words do have.

[1.] The practical result is, that as, to, say, a half interest in the property, the wife took what, is equivalent to, a separate estate.

Did she bind this interest, by indorsing her husband's notes?

Whether, when the wife has property settled to her separate use generally, without restriction as to alienation, but with no grant of the power of alienation, she can dispose of the property, to the use of her husband, is a vexed question. 3 *Johns. Ch. R.* 77. I incline to think that she can not. A married woman has not capacity to contract, and therefore, the contracts of a married woman are void. That this is the general principle of the common law, nobody, I believe, disputes. Can her having separate property make any difference in this respect? However, I hold myself open on this question.

But when the property is not settled to the wife's separate use generally, but is settled to her use, subject to a restriction against alienation, then, there is no question, I believe, but that she is, to the extent of the restriction, debarred from the power of alienation.

Is there any such restriction, then, in this settlement?

We think there is. The words, "not to be subject, in any manner, to the debts, contracts, or engagements," of the husband, have, as we think, the effect, not only to prevent the estate created in the wife, from passing, by the marriage, into the husband, but also, the effect to deprive her of the power of subjecting that estate, *in any manner*, to the debts of the husband. To this extent, at least, we think they restrain her power of disposing of this estate.

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But, if they restrain her from subjecting the property, *in any manner*, to the debts of her husband, they restrain her from subjecting it to those debts, by the manner of guarantying or endorsing those debts. And that is the manner which she adopted in this case; she endorsed his notes. True, she, as endorser, represents, it may be said, an independent contract of her own; but then, if this estate of hers, pays that contract, it, thereby, pays the other contract, the debt of the husband, so far as the present holders of the debt are concerned; and thus, in that case, her estate will in one "manner" have been "subject to the debts" of her husband.

[2.] We think, then, that, by virtue of these same words, her power over her estate was so restricted, that she could not by endorsing her husband's notes, subject the estate to the payment of those notes.

The result, thus far, is, that we think, that the wife had by the deed, what was equivalent to a separate estate; but that this estate was so restricted, that she could not, and therefore did not, bind it, by her endorsements made on her husband's notes; and, consequently, the result thus far is, that there is in our opinion no equity in the bill, as to this estate in the wife.

This is the result as it respects Judge Lumpkin and myself.

Judge McDonald thinks, I believe, that the words create no separate property in the wife; but then, he also thinks, that she has *an equity*, which entitles her, to as much as she can get by the result at which we, the other two Judges, have arrived. Hence, he does not see fit to dissent from that result.

[3.] Say, then, that the wife and the husband, take each, an equal interest in the property; and, for convenience sake, let us assume this interest to be one-half. Is the half in the husband, such an interest, that it could not be reached by these creditors, without prejudice to the other interest in the property? We think that it is. It is difficult to see how

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there could be any sale of the property, or of any interest in it, to satisfy these debts, without prejudice to the interest of the wife, and that of the issue of the marriage. The better way is, that so much of the income, as the husband is entitled to, be paid, under the decree of a Court of Equity, to the creditors, instead of to him.

In this view of the case, we agree with the Court below—restricting their view to the share of the property which, we say, the husband takes.

There remains but one other question. These creditors had not reduced their debts to judgment, when they commenced the suit. But they say, that Kempton is wholly insolvent, except as to his interest under the trust deed. This, we think, was reason enough to justify a suit before the debts had been reduced to judgment. In such a case, getting judgment would be a waste of time, labor, and money, without any compensation.

Judgment affirmed.

DOLSEY HARRING, plaintiff in error, vs. WILLIAM W. BARWICK, defendant in error.

bill of exceptions and transcript of the record
r seal, by the Clerk of the Superior to the Clerk

Court certify "that the above and foregoing is
the records in my office, of the foregoing stated
need not use the words "complete transcript."

tween the signing of the bill of exceptions, and
is a substantial compliance with the Act of 1856,
on days elapsed from the acknowledgment of
exceptions.

Key

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But, if the exceptions was signed by the presiding Judge, *any manner* and day of November, 1857, service was acknowledged from such the same day by the attorney of the opposite party; and it was filed in the Clerk's office on the 13th day of the month, making in all but eleven days from the time the bill of exceptions was signed and certified to the time when it was filed with the Clerk. Whereas, by the 4th section of the Act of 1856, twelve days as the law is *printed*, or twenty, as it is said to have *passed*, may intervene between the signing by the Judge and filing with the Clerk; one day more of delay than actually transpired, in this case. We must think, indeed we cannot doubt but that this is a substantial compliance with the Act. And if so, the exception taken should not be allowed.

Having disposed of these preliminary questions, it only remains to notice for a moment the case upon its merits.

The Judge, amongst other things, charged the jury that if they believed, from the evidence before them, that the defendant was in adverse possession of the premises in dispute, claiming them as his own, at the time the plaintiff purchased the same from Aaron Hutchinson, the grantee, that the statute of 32d Henry VIII., against maintenance, in force in this State, applied to this case, and that they must find for the defendant.

It is conceded that if this charge be wrong, the judgment is erroneous and must be reversed. While my opinion upon this point remains unchanged, as expressed in the case of *James Morris et al., against George W. C. Monroe*, ejectment from Lee county, and decided at Macon at the June Term of this Court, 1857, and reported in the 22d volume, nevertheless, a majority of the Court having held otherwise, that case must cover and control this. And I feel that it would not be becoming, much less am I required to manifest by a formal dissent, my individual opinion whenever this point comes up. It is for the Legislature, should it see fit,

ders the edge of the nucleus or body indistinct. *Webster's Royal Octavo Dictionary*, page 360.

In common parlance, we ask for a packet of envelopes, or self-sealing envelopes. Thus applying the name before sealing. Whenever a bundle of papers are folded up in a cover they are said to be enveloped, with or without a seal, or even tape.

But we are called upon to put a strict construction upon the term, to protect the integrity of records, which being Anglicised means, dismiss a case without a hearing, upon its merits, lest some attorney should, at some time or other, and to his ultimate and utter ruin, (for he never could profit by it, except for a season,) prove himself a gratuitous scoundrel! For myself, I am weary, I confess, at listening to such imputations. A professional experience of nearly forty years, repels all such suggestions. Let a case of suspicion arise, and none such has occurred during the twelve years that I have been upon this bench, and then it will be time enough to invoke this rigid application of the rule. Otherwise, in my humble opinion, it affords no justification for this Court to establish a rule founded upon considerations so debasing to an honorable profession. It is bad enough for the bar to lie down under the reproach cast upon it by the other branches of the government, of not being deemed competent witnesses. Let us not stand forth before the world self-acknowledged felons!

[2.] Nor is the second objection more tenable. The Clerk, at the record sent up was He does certify "that the d true copy from the re-d foregoing stated case," tial compliance with the

or dismissing the writ of tions was not filed in the Court within two or ten service.

Kearney v. Herring vs. Barwick.

But, if the exceptions was signed by the presiding Judge, any manner day of November, 1857, service was acknowledged from such the same day by the attorney of the opposite party; it was filed in the Clerk's office on the 6th day of the month, making in all but eleven days from the time the bill of exceptions was signed and certified to the time when it was filed with the Clerk. Whereas, by the 4th section of the Act of 1856, twelve days as the law is *printed*, or twenty, as it is said to have *passed*, may intervene between the signing by the Judge and filing with the Clerk; one day more of delay than actually transpired in this case. We must think, indeed we cannot doubt but that this is a substantial compliance with the Act. And if so, the exception taken should not be allowed.

Having disposed of these preliminary questions, it only remains to notice for a moment the case upon its merits.

The Judge, amongst other things, charged the jury that if they believed, from the evidence before them, that the defendant was in adverse possession of the premises in dispute, claiming them as his own, at the time the plaintiff purchased the same from Aaron Hutchinson, the grantee, that the statute of 32d Henry VIII., against maintenance, in force in this State, applied to this case, and that they must find for the defendant.

It is conceded that if this charge be wrong, the judgment is erroneous and must be reversed. While my opinion upon this point remains unchanged, as expressed in the case of *James Morris et al., against George W. C. Monroe*, ejectment from Lee county, and decided at Macon at the June Term of this Court, 1857 nevertheless, a majority of that case must cover and would not be becoming, in my opinion, by a formal dissent, my point comes up. It is for

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to speak authoritatively, as to this ancient and settled case referred to, undisputed principle of the law, so far as I know myself, or am informed by others.

Judgment reversed.

THOMAS W. OLIVER and WIFE, et al., plaintiffs in error.
JAMES G. STONE and WIFE, defendants in error.

Delivery is essential to a deed.

In equity, from Burke Superior Court. Decision by Judge HOLT, at November Term, 1857.

Thomas W. Oliver and Eliza Oliver, his wife, and John D. Lassiter and Mary Lassiter, his wife, filed this bill against James G. Stone and Eliza, his wife, formerly Mrs. John Burke, for an account and partition of certain negroes alleged to be in defendants' possession, and which were charge belong to them and the said defendants as tenants in common, under a certain deed of gift, executed by John Glisson, the father of Mrs. Stone and grandfather of Oliver and Mrs. Lassiter.

The defendants answered the bill, and claimed that the said slaves as tenants in common were

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possession of said Dennis until after his death, when being found amongst his other papers, and supposed to be useless or of no validity, was torn up, but afterwards some of the fragments gathered up and pasted together; but some and those containing material parts, were lost and never replaced. And this paper thus mutilated, was afterwards, and after the death of said Dennis Glisson, recorded, and is the same paper mentioned in complainants' bill, and under which they claim an interest in the negroes in controversy.

Upon the trial, complainants offered in evidence the original deed, having the appearance of a mutilated paper, of which the following is a copy:

GEORGIA, BURKE COUNTY. Know all men by these presents, that I, Dennis Glisson, of the State and county aforesaid, for and in consideration of the love, good will and affection that I have and do bear towards my daughter, Eliza Burke, and her two children, Mary and Eliza, of the same place, have given and granted, and by these presents, do freely give and grant unto the said Eliza Burke, and her said two children, their heirs and assigns, a negro woman named Ann, with her child, Lewis, and a girl named Redilla, with their increase; reserving to myself the right to use said property for my own proper use and benefit during my natural life; to have and to hold the above named negroes unto them, the said Eliza Burke and her said two children, their heirs and assigns forever; and I, the said Dennis Glisson, for myself, myself, my heirs, executors and administrators, shall and will warrant and defend by these presents.

In witness whereof, I have hereunto set my hand and seal this twenty-eighth day of October, eighteen hundred and thirty-seven.

his

DENNIS ✕ GLISSON. L. S.

mark.

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Signed, sealed and acknowledged in presence of
 GEORGE S. PERRY,
 GEORGE POLLOCK.
 ISAAC J. HEATH, J. P.

GEORGIA, BURKE COUNTY.

Clerk's Office, Superior Court.

Recorded in Record Book, Deeds No. 11, folios 34 and 35,
 this 29th May, 1852.

EDWARD GARLICK, Clerk.

Defendants' counsel objected to the said deed going to the jury, on the ground of its appearing upon its face to have been *altered*. The Court sustained the objection and refused to allow the deed to be read to the jury.

Complainants then introduced Jacob G. Glisson, who testified, that he had seen the deed tendered him; that his father, said Dennis Glisson, had made deeds to his several children or grand-children of like character of the above deed; that by one of said deeds witness was given property; that after his father's death there was some dissatisfaction among the heirs, on account of witness' receiving more than the other distributees; that witness and the other distributees agreed to an equal division of D. Glisson's estate, the witness keeping the land, and the other heirs what property they were in possession of; that he and the other distributees agreed to tear up all the papers (deeds or wills) made by their father; that in consequence of said agreement, witness destroyed by tearing said deed now offered; that afterwards, he thinking that perhaps he had done wrong, collected the pieces and pasted them together; that the deed offered is said deed; that when he collected and pasted the pieces together, all the parts were in his possession; they were pasted upon another sheet of paper; that the two corners, right and left, at the top, becoming lost, he supplied the same, running out on the new sheet of paper the words wanting; that with this ex-

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ception, the paper is the original deed; that at the time of the destruction of said deed, complainants' wives were minors and very young; were not represented at said agreement to destroy said papers, and were not represented nor did they consent to the division of property of Dennis Glisson; that Mrs. Eliza Stone, wife of defendant, J. G. Stone, was in the house when the papers were destroyed, and knew and consented to said destruction; that Mrs. Eliza Stone is the daughter of Dennis Glisson, and mother of complainants' (Oliver and Lassiter') wives; that her first husband was Jeremiah Burke; on her marriage with Burke, she carried the negroes named in the deed with her; they remained in her possession till on Burke's death, old man Glisson carried her, Mrs. Burke, her two daughters and negroes back to his house, where they remained, till Stone's marriage with Mrs. Burke, when the said negroes were carried home by Stone's and his wife.

Jacob G. Glisson cross-examined: That said paper and others of like character to other children, was in possession of said Dennis Glisson at the time of his death, found in his desk, and all were destroyed or torn up with the deed in question; that said supplied parts were made by witness from recollection, except the interlineation of the words "granted" and "grant" on the 7th and 8th lines; that the words were "bequeathed" and "bequeath;" all the fragments were at first in his possession and pasted together, but afterwards became some of them lost; that there was a division of D. Glisson's property between the heirs at law; the petitioners were A. S. Jones, Robert Lovet and P. L. Wade, the others not recollected; that the negroes conveyed by said deeds were not comprised in said division; the agreement among the heirs was that each one should keep the negroes their father had conveyed, and that they themselves should value them; that said petitioners had nothing to do with said negroes. Dennis Glisson died before the deed was recorded.

By Complainants.—That the supplied parts of said deed

are as the original, except the words granted and grant; with this exception believes that it is the same as the lost parts.

Complainants again offered the deed, which the Court, upon objection, refused to allow to go to the jury, for want of proof of execution, holding that the Clerk's certificate of the mutilated deed did not amount to such proof.

Complainants then introduced Isaac J. Heath, who, being sworn, testified that, at the request of Dennis Glisson, he prepared said deed, and others of like character, conveying property to his children and grand-children; that said Dennis Glisson signed, sealed and acknowledged said deeds at the district court ground; that George S. Perry, George Pollock and witness tested the same, in the presence and at the request of said Dennis; that witness attested the same officially, as a Justice of the Peace, and the paper presented is the same, substantially, as the one he drafted; that among said deeds was one conveying property to Jacob G. Glisson of like character with the one now in contest.

Cross-examined.—That Dennis Glisson carried all of said deeds written by witness away from the court ground with him after the execution of the same.

Complainants' counsel asked Isaac J. Heath if Dennis Glisson did not then do all that he deemed necessary for the due execution of the deed, which being objected to by defendants was overruled by the Court.

Complainants offered George S. Perry, who testified that Mr. D. Glisson sent for him to witness some papers, which he did with George Pollock and Squire Heath; they all attested the deed presented at Mr. Glisson's request; Mr. Glisson executed the same, in their presence, at the court ground; that Dennis Glisson said it was his deed. There were other deeds executed at same time. Dennis Glisson took them all home; that none of the grantees nor any one representing them was present.

Complainants offered the deed, which being objected to as

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appearing to have been altered and wanting delivery, the Court again ruled out.

Complainants then offered the deed as mutilated paper, with a copy of the same in its original form, which the Court ruled out.

J. G. Glisson recalled for complainants, testified that his father told him he had given property to his children, and that he had given him (the witness) enough, if he would take care of it.

Complainants asked J. G. Glisson if his father did not consider the property named in this deed as being conveyed to grantees, according to its terms, which being objected to, the Court refused to allow the witness to answer.

The depositions of Christian Paris and Frederick Bell, two witnesses examined by commission, on the part of complainants, were rejected by the Court, on the ground of their irrelevancy to the issue made by the bill and answer.

Whereupon complainants dismissed their cause, but without prejudice, and except to the rulings and decisions of the Court excluding said testimony and evidence.

MCKENZIE & WARD, JONES & STURGES, for plaintiffs in error.

MILLERS & JACKSON, C. J. JENKINS, for defendants in error.

By the Court.—BENNING, J. delivering the opinion.

Oliver and wife, and Lassiter and wife, claim, not as heirs of Jeremiah Burke, the father of the two wives, but as donees of Dennis Glisson, the grand-father of the two wives—donees under a deed of gift made, as is alleged, by Dennis Glisson.

Stone and wife deny the existence of any such deed of gift.

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They say, that if any such deed was ever written and signed, by Dennis Glisson, it was never *delivered* by him.

The Court below excluded this deed or paper, from the jury, thinking, that the evidence was not sufficient to show the paper to have been delivered. This seems to be the ground on which the Court put its final decision—a decision made after all the evidence was out.

Was there evidence sufficient to show a delivery of the paper? This, then, is the question.

The evidence of the two of the subscribing witnesses, examined, was to this effect: that Dennis Glisson "signed, sealed and acknowledged" this, and other "deeds" "of like character," conveying property to other children or to grandchildren; that they signed the "deeds" as witnesses, and at his request; that he said this was his deed; that he took all of the deeds into his own possession after signing them and carried them away with him; that none of the grantees, or any one representing a grantee, was present.

The evidence of Jacob G. Glisson was, that this paper and others of like character, to other children, was in the possession of Dennis Glisson at his death, being found, after his death, in his desk; that these papers were all torn up by the heirs, who agreed among themselves, that the property should be equally distributed among them; that he gathered up the fragments of this paper, and pasted them on another sheet of paper; that this paper was recorded, but not until after the death of Dennis Glisson.

This witness also testified, that, on the marriage of Mrs. Stone with Burke, her first husband, she carried the negroes mentioned in this paper home with her; that they remained in her possession till Burke's death, when old Mr. Glisson carried her, her two daughters, and the negroes, back to his house, where they remained till Stone's marriage with her, when the negroes were carried home by Mr. and Mrs. Stone.

This I believe is all of the evidence, that bears upon the question of the delivery of the paper.

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And this, we think, is not sufficient to show a delivery of the paper. This shows, that the paper was never delivered to any one, for any purpose, but that it was always kept by the person who signed it, in his own possession along with other papers of a similar character, signed by him at the same time. Had he parted with dominion over the paper? Had he lost the power of revoking it? We think not. *Acton vs. Woodgate*, 2 Myl. & Keene; *Garrard vs. Lord Lauderdale*, 3 Sim.; *Wallyn vs. Coutts*, 3 Mer. 707; *Williams vs. Everett*, 14 East 582. In *Garnors vs. Knight*, 12 Eng. Com. L. R., there was, first, a delivery of the paper to the sister of the donor, with directions to keep it, and a statement, that it belonged to the donee; secondly, an understanding between the donor and donee, that the former was to secure the latter. Still, I must say, that I think *Garnors & Knight*, somewhat difficult to uphold.

But it was insisted that the possession of the negroes, was in accordance with the paper, and that this fact was sufficient to make out the delivery of the paper. But is it true, that the possession of the negroes was in accordance with the paper? The possession commenced in Mrs. Stone with her first marriage—a time long before the date of the paper. There is no evidence to show, that she ever surrendered this possession to her father, the signer of the paper; nor is there any, to show that she ever recognized the deed, or even knew of its existence before his death. True, she went with the negroes to his house to live with him, when her first husband died; but it is equally true, that when she married again she went away with the negroes; and there being nothing to show, that she knew of the existence of this paper, at this time, it is to be presumed, that she went away holding the negroes under the same title under which she had held them, when she came.

Then, it was said, that the paper had been recorded. But the act of recording did not take place, until after the death

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of the signer of the paper. The act therefore, could not be his act; and if not his act, it could not be an act that could affect him, or, the paper.

Upon the whole, then, we think, that the evidence was not sufficient to show a delivery of the paper. Consequently, we think, that the Court below did not err in its final judgment made when all the evidence was out, excluding the paper from the jury.

It becomes unnecessary, therefore, to consider the previous judgments of the Court, made at successive stages of the evidence, excluding the paper.

Some interrogatories were excluded.

These, if admitted, would have proved, that the negroes belonged exclusively to the two daughters of Mrs. Burke, (afterwards Mrs. Stone,) whereas the paper said, that the negroes belonged equally to her and the two daughters. The interrogatories, therefore, could not have supported the paper, and the bill was founded solely upon the paper. We see no error, therefore, in the exclusion of the interrogatories.

We find nothing, then, to reverse, in the action of the Court below.

But we do not wish to be understood as intimating an opinion, that the plaintiffs in error, may not have a right of action *as heirs of Jeremiah Burke*. The question, whether they may, or may not, have such an action, is not presented by their case as that now stands.

Judgment affirmed.

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But, if the exceptions was signed by the presiding Judge, any manner day of November, 1857, service was acknowledged from such the same day by the attorney of the opposite party; and it was filed in the Clerk's office on the 11th day of the month, making in all but eleven days from the time the bill of exceptions was signed and certified to the time when it was filed with the Clerk. Whereas, by the 4th section of the Act of 1856, twelve days as the law is *printed*, or twenty, as it is said to have *passed*, may intervene between the signing by the Judge and filing with the Clerk; one day more of delay than actually transpired in this case. We must think, indeed we cannot doubt but that this is a substantial compliance with the Act. And if so, the exception taken should not be allowed.

Having disposed of these preliminary questions, it only remains to notice for a moment the case upon its merits.

The Judge, amongst other things, charged the jury that if they believed, from the evidence before them, that the defendant was in adverse possession of the premises in dispute, claiming them as his own, at the time the plaintiff purchased the same from Aaron Hutchinson, the grantee, that the statute of 32d Henry VIII., against maintenance, in force in this State, applied to this case, and that they must find for the defendant.

It is conceded that if this charge be wrong, the judgment is erroneous and must be reversed. While my opinion upon this point remains unchanged, as expressed in the case of *James Morris et al., against George W. C. Monroe*, ejectment from Lee county, and decided at Macon at the June Term of this Court, 1857, and reported in the 22d volume, nevertheless, a majority of the Court having held otherwise, that case must cover and control this. And I feel that it would not be becoming, much less am I required to manifest by a formal dissent, my individual opinion whenever this point comes up. It is for the Legislature, should it see fit,

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to speak authoritatively, as to this ancient, and before the case referred to, undisputed principle of the law in this State, so far as I know myself, or am informed by others.

Judgment reversed.

THOMAS W. OLIVER and WIFE, et al., plaintiffs in error, vs.
JAMES G. STONE and WIFE, defendants in error.

Delivery is essential to a deed.

In equity, from Burke Superior Court. Decision by Judge
HOLT, at November Term, 1857.

Thomas W. Oliver and Eliza Oliver, his wife, and Orren D. Lassiter and Mary Lassiter, his wife, filed this bill against James G. Stone and Eliza, his wife, formerly Mrs. Eliza Burke, for an account and partition of certain negro slaves alleged to be in defendants' possession, and which they charge belong to them and the said defendants, as tenants in common, under a certain deed of gift, executed by one Dennis Glisson, the father of Mrs. Stone and grand-father of Mrs. Oliver and Mrs. Lassiter.

The defendants answered the bill, and denied that they held said slaves as tenants in common with the complainants, but claim the same as their individual absolute property, and which were given to the defendant, Mrs. Stone, by her father, the said Dennis Glisson, upon or during her marriage with her former husband, ——— Burke. They further deny that said Dennis ever executed any such deed as that set out in complainants' bill; that said deed, if ever signed, was never delivered but the same remained in the

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sufficient verdict, and the copy is therefore inadmissible. This objection is based on the mode of proceeding in England. There, whether the trials are at bar or at *nisi prius*, each cause has its distinct jury, and the names of the jurors appear in the judgment roll. Here, our juries are empanelled differently, and all causes at issue, at one term of the Court, are submitted to juries, summoned and empanelled according to our statutes for the trial of every cause depending between parties litigating at that term. Their names appear on the minutes at the beginning of the term. In no case tried by a petit jury, do the names of the jurors who tried it, appear in the verdict, or annexed thereto. The verdicts are usually signed by a foreman, but, if in any case, that be not done, and the verdict appears in the record without his signature, and a judgment is signed thereupon, it must be presumed that the verdict was satisfactory to the Court, and deemed by it, to be sufficient in form and substance, to warrant the judgment.

We may, indeed, say, that if a cause be tried in the Inferior Court, and a verdict be rendered against the defendant, and he neither appeals therefrom, nor moves in arrest of judgment, and the judgment of the Court be entered up thereon, the verdict must be considered sufficient to warrant the judgment, so far as it is entered in conformity thereto. There is a verdict in the words in this case, and although it is not signed by the jury, or a foreman, as is commonly done, we must presume that it was returned into Court as the verdict of a jury, regularly empanelled and sworn, in a manner satisfactory to the Court, which rendered judgment thereon.

Judgment reversed.

THE AUGUSTA AND SAVANNAH RAILROAD COMPANY, plaintiff in error, vs. JAMES R. McELMURRY, defendant in error.

- [1.] If in a proceeding against a Railroad Company, it is alleged that the injury complained of was committed on a different day from that shown by the proof, the variance is not fatal.
- [2. and 3.] The law requiring blow posts to be erected by Railroads, at the distance of two hundred yards from crossings, signals to be given of the approach of trains, &c., may be looked to, as indicative of the Legislative mind, as to the subject of diligence, in suits against the company for civil injuries.
- [4.] A plaintiff may recover of a Railroad Company for an injury done to his person or property, although not without fault himself, provided the mischief was the result of gross negligence on the part of the company, and could have been avoided by the exercise of ordinary care.
- [5.] All judgments are presumed legal until the contrary is shown, and the burden is upon the plaintiff in error to make out affirmatively that the decision complained of is erroneous. And he must embody in his bill of exceptions, enough of the testimony to satisfy the reviewing Court that he is entitled to the charges requested, not as abstract propositions, but as the law of the case upon the facts proven; and failing to do this, he must suffer the consequences.
- [6.] It is not unqualifiedly true, that no particular speed is required by law of Railroads. The train must be so checked as to enable the engineer to stop his machine at crossings, to avoid collisions, and it is not incumbent upon the plaintiff to show that the speed was reckless, and that the engineer could not have stopped his train before reaching the crossings: or that he saw the obstruction and heedlessly proceeded.
- [7.] The failure of a Railroad train to comply with the requisitions prescribed by law, does not necessarily make a road liable for damages, nevertheless it will be sufficient usually to constitute a *prima facie* case, or want of due diligence.

**Assessment of Damages, in Richmond Superior Court.
Tried on appeal before HOLT, Judge, at October Term, 1857.**

Under the provisions of the statute of 1851-'2, page 108, James R. McElmurry served a written notice on the Augusta and Savannah Railroad Company to appear at the Inferior Court to be held in and for Richmond county, on the Thursday after the first Monday in March, 1756, to show cause why the damages should not be assessed against said compa-

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ny for killing a negro woman belonging to plaintiff of the value of one thousand dollars, and *tearing to pieces* and injuring a certain cart of the value of thirty dollars, "by the running of a car, engine or locomotive or other machinery, on said road." The killing and injury were alleged to have been done by said road "on the night of the 4th February, 1856, in the county of Richmond, at or near the place where the common road leading to *Bénnock's old mill* crosses the Augusta and Savannah Railroad, the same being nearer to McBean's than to any other station."

By consent of parties, the case was transferred to the appeal docket of the Superior Court of said county.

The case came on for trial on the appeal, at the October Term, 1857, of Richmond Superior Court, Judge Holt, presiding: After the testimony was closed, and argument by counsel, the defendant requested the Court to charge the jury upon various grounds, all of which the Court refused, save two.

To which refusal to charge, counsel for defendant excepted, and assigns error:

1st. Because the Court declined to charge as requested by defendant as follows: "This suit being a proceeding under a special statute, the allegations must conform to the proofs, and, if the jury find that the damage is alleged to have been committed on the 4th, and the proof shows that it was done (if at all) on the 5th of the month, the verdict must be for defendant."

2d. Because the Court declined to charge as requested by defendant as follows: "The act of January 22, 1852, is a penal statute, and is not the measure of the defendant's liabilities or of the plaintiff's rights in this civil suit."

3d. Because the Court declined to charge as requested by defendant as follows: "The civil liability of railroad companies, by the 5th section of said act, remains as before its passage, and is not affected by the act."

4th. Because the Court declined to charge as requested by defendant as follows: "In an action against a Railroad Company to recover damages for injuries sustained in consequence of the negligent running of rail-road cars, in order to warrant a recovery by plaintiff, it must appear that the defendant's agents were guilty of negligence, and that the plaintiff, himself, and his servant, were free from negligence or fault;" and further, "it is necessary for the plaintiff to establish the proposition, that he himself and his servant were without negligence and without fault."

5th. Because the Court declined to charge as requested by defendant as follows: "The engineer was not bound to hold up his engine, provided he might have stopped the machine between the blowing post and crossing."

6th. Because the Court declined to charge as requested by defendant as follows: "No particular speed is prescribed by law, and the defendants are not liable unless the speed is shown to have been reckless; and it is necessary for plaintiff to show, before he can recover, that the engineer could not have stopped his engine before reaching the crossing, or that he saw the obstruction and heedlessly proceeded."

7th. Because the Court declined to charge as requested by defendant as follows: "The failure to blow the whistle, to check the speed, or to erect sign boards, does not necessarily make a road liable for damages done on the road," and charged the same to be a want of due diligence by the defendant.

The charge of the Court on the fourth point was briefly this: that defendants are bound for reasonable care and diligence in running their cars, and a departure from the rules of running prescribed by law is a want of such care and diligence;—that when the plaintiff is chiefly in fault he cannot maintain an action; where the parties are equally in fault, he cannot maintain an action; but that though the

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plaintiff be somewhat in fault, yet, if the defendants have been guilty of gross negligence, he may maintain an action.

WM. W. HOLT, *Judge*.

Dec. 3d, 1857.

MILLERS & JACKSON, for plaintiff in error.

WALKER & RODGERS, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Was the Court right in refusing to charge the jury, that if the injury was alleged to have been committed on the 4th day of the month, and the proof showed that it was done on the 5th, that the verdict must be for the defendant?

It is argued that this being a summary proceeding, and in derogation of the common law, should be construed strictly. Acts relative to railroads cannot be in derogation of the common law, for railroads were unknown to the common law; and the principles of the common law applicable to ordinary public roads and vehicles, would not apply to steam engines with their tremendous speed and power. Jones's Forms is a great innovation upon the common law, and yet being intended to advance the remedy, are liberally construed. Railroad acts, we apprehend should not be construed more strictly than penal statutes, and no such rule as to the time laid in the indictment is observed in criminal proceedings.

The act itself evidently contemplates some latitude in this respect. The notice given is to contain a statement of the time and place of the injury, "as near as can be ascertained;" but it is not required that it should set forth precisely when and where the damage was perpetrated. *Pamphlet Laws; 1853-'4, p. 93.*

[2. and 3.] As to the 2d request, it is not pretended that the Act of 22d January, 1852, is the measure of the defendant's liability or of the plaintiff's rights in a civil suit. We

do not know that we correctly apprehend the meaning of the terms in which this request was made. We do not suppose, that because this act imposed a fine of \$1,000 upon one officer and of \$500 upon another for violating its provisions, that therefore \$1,000 or \$500 was the measure of damages for the destruction of property regardless of its real value. The word *measure*, was not used with etymological accuracy. It was simply meant to affirm by the 2d and 3d, that the act had nothing to do with the civil liability of the company.

If we are right in this construction, then we must dissent from the proposition. The Act certainly has *something* to do with the matter. In requiring blow posts to be erected at the distance of two hundred yards from the crossings and signal to be given, of the approach of the train, and to check the speed of the engine, so as to put it in the power of the engineer to stop entirely, to prevent collision at the crossings, and making it penal to omit these duties, the Legislature intended to indicate in unmistakeable language the views it entertained upon the subject of negligence, as to this particular class of injuries. Hence the remark which fell from this Court, through kindness to railroads, in a former opinion, that they would do well to look to these provisions of the law. A failure to do so, and damage resulting therefrom, would, to say the least of it, make out a *prima facie* case against the company. We suppose that the declaration in the 5th section of the act, that the civil liability of the company remained as before its passage, was intended merely to negative the inference, that this civil liability was discharged in consequence of the penalties imposed by the act. In other words, to rebut the presumption that the civil injury was merged in the crime.

[4.] According to the previous adjudications of this Court in 18th and 19th *Georgia Reports*, in which the Macon and Western Railroad Company was defendant, this 4th re-

The Augusta and Savannah Railroad Co., vs. McElmurry.

quest does not state the law correctly. It is not necessary to enable the plaintiff to recover, to show, that he is without fault. On the contrary, the learned Judge has stated the rule correctly, one enunciated by this Court after much deliberation, and one which approximates perhaps, as near to accuracy as is possible in such cases. It is this, that although the plaintiff be somewhat in fault, yet if the defendant be grossly negligent, and thereby occasioned or did not prevent the mischief, the action may be maintained.

[5.] The next assignment of error is, that the Court declined to charge the jury when requested, that the engineer was not bound to hold up his engine provided he might have stopped the machine between the blowing post and crossing.

As to this request, we have this to say, that while it may be true in the extreme case put by the learned counsel, that if the train be merely dragging along at a snails pace, it may not be necessary further to check its speed, still unless the proof showed that such was the fact in this case, we are not authorized to reverse the judgment. The state of things conjectured, is neither more nor less, than that exacted by the statute. To be moving at the rate of fifty yards an hour, is to check the engine, so as to have it completely under the control of the engineer. And that is all the law demands. All judgments are presumed legal until the contrary appears: and the burden is upon the plaintiff in error, to show affirmatively that the decision complained of is erroneous, and he must embody in his bill of exceptions, enough of the testimony to satisfy the reviewing Court, that he was entitled to the charge asked, not as an abstract proposition, but as the law applicable to the actual proof in the case. Failing to do this, he must suffer the consequences.

[6.] We take issue with the able counsel, as to the law of case as set forth in the sixth request to charge. A particular speed is *required*, at or near the crossings. The train must be so checked as to enable the engineer to stop his machine

at crossings. And it is not incumbent upon the plaintiff to prove, that the speed was reckless, and that the engineer could not have stopped the train before reaching the crossing: or, that he saw the obstruction and heedlessly proceeded. Suppose the contrary of all this be true; still if the signal was not given at the distance of two hundred yards to put the other party on their guard, the company might be made liable. And in addition to this, we have the same reply to make as to the proof, that we did under the 5th assignment, and that is, that the circumstances of the case did not justify this request.

[7.] And so of the last request. While it may be conceded, that the failure of the train to comply with the duties prescribed by the statute, does not necessarily make a road liable for damages, still it will constitute a *prima facie* case, and usually will be sufficient to establish a want of due diligence.

No new trial was applied for in this case; and therefore under the Act of 1853, 1854, as interpreted by this Court, any misdirection does not *per se* entitle the party cast to a new trial. It may be, that the evidence entitled the party to the charges requested, still if no injury resulted from the refusal of the Court to give them, or substantial justice was done, we have not felt constrained to grant a new trial, unless a motion was made for that purpose and refused in the Court below.

Judgment affirmed.

Justices Richmond Inf. Court vs. The State.

**THE JUSTICES OF THE INFERIOR COURT OF RICHMOND COUNTY,
VS. THE STATE, EX. Rel., LEMUEL DWELLE, SR., defendant
in error.**

The county is not liable to pay a person for food and lodging furnished by him to a jury; and this although he may have been ordered by the Court to charge his account to the county.

Mandamus, in Richmond Superior Court. Decision by Judge HOLT, at October Term, 1857.

At the April Term, 1857, of Richmond Superior Court, Judge Holt ordered, that the petit jurors, while engaged and detained in the trial of criminal cases, be furnished with food and lodging. By virtue of this order, the Sheriff engaged or made arrangements with Lemuel Dwelle, Sr., to provide the jurors with said board and lodging, who, at the termination of the Court, rendered his account therefor, amounting to \$186, which was allowed by the presiding Judge. Dwelle afterwards presented his account for payment to the Inferior Court, who refused to pay the same, and he therefore applied to the Superior Court for a mandamus to compel said Inferior Court to grant him an order upon the county Treasurer for the payment of his account.

In answer to the *rule nisi*, the Justices of the Inferior Court showed for cause,

1st. That there was no funds in the treasury for the payment of said demand.

2d. That there was no law requiring or authorizing the payment of said demand.

Upon the hearing, the presiding Judge of the Superior Court held the showing insufficient, and ordered the mandamus to issue. To which decision the Justices of the Inferior Court excepted.

W. T. GOULD, for plaintiff in error.

W. G. JOHNSON, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

We do not know of anything, in any law, that makes the county liable to pay for the food and lodging furnished to a jury.

It is not contended, that there is anything having this effect, in the common law.

But it is said, that there is something having the effect, in the Act of 1831, to amend the oath of bailiffs. But surely that cannot be true, rather the reverse of it must be true. The second section of the Act is in these words: "whenever it shall so happen, that the jury is confined in the investigation of any case, for a ~~length~~ of time, which exposes them to hunger or cold, the Court may, on application from said jury, direct them to be furnished, at their own expense, with such nourishments as in his own judgment may seem just and proper, and permit them to have provisions or fire, or either, if circumstances should, in the judgment of the Court, require." *Cobb Dig.*, 554.

Are the idea that the "nourishments" are to be furnished at the expense of the county, is excluded.

The oath prescribed, is as follows: "You shall take this oath, and all others committed to your charge, during the present term, to the jury-room or some other private and convenient place, where you shall keep them without meat, drink or fire, candle-light and water only excepted, (unless otherwise directed by the Court,") &c.

In this, there is nothing in the least, inconsistent with the second section, nothing that favors the idea, that the jury, in any case, is to be fed and lodged at the expense of the county. It was not insisted that there is any other statute bearing upon the subject.

It was said, however, that some liability of this kind, in the public, is necessary to the administration of justice. But there was a time, when nobody thought that such a liability

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exists; a time, when there was no practice or example of laying the expense of feeding and lodging a jury on the public. Yet, during that time, justice was administered. Even up to the present time, it continues true, I believe, of other States of this Union, and also, true of England, that this expense is not laid on the public.

We think, then, that the county of Richmond, was not liable to pay Mr. Dwelle, his account for food and lodging furnished by him to the jury, and consequently that the decision excepted to was wrong.

We do not mean to intimate, that the Court below did not have the power to allow the jury to refresh themselves at their own expense.

Judgment reversed.

JOHN SILCOX & WIFE, plaintiffs in error, vs. JOHN NELSON et al., ex'rs, defendants in error.

- [1.] A party claiming a legacy as lapsed to the heir at law, on the ground that the legatee named in the will has had no existence, must make clear and satisfactory proof of the allegation, to entitle himself to it.
- [2.] A legacy lapsed, does not fall into the residuum, where it is manifest, from the will, that the testator did not intend that the residuary legatees, from the nature of the bequests or devises to them, should take any part of a legacy.
- [3.] When residuary legatees are not, from the construction placed upon the will, interested in the question of lapse, they are not necessary parties to the bill.

In Equity, from Richmond Superior Court. Tried by before Judge HOLT, at October Term, 1857.

This bill was filed by John Silcox and Charlotte his wife, formerly Charlotte Nelson, widow of Matthew Nelson, de-

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ceased, against John Nelson and James Harper, executors of said Matthew, for the recovery of the sum of two thousand dollars, with interest, claimed by complainants, as heirs at law, of said deceased, the same being a legacy bequeathed by testator to the trustees of the Braithwaite School in the Parish of Ripon, county of York, in England, and which legacy complainants allege lapsed, and belongs to the heirs at law of deceased.

The following is a copy of the last will and testament of said Matthew Nelson, deceased.

GEORGIA, RICHMOND COUNTY:

I, Matthew Nelson, of Augusta, in the State of Georgia, being of sound mind and memory, do make this, my last will and testament, in manner and form following:

I desire all my property, both real and personal, except my wearing apparel, furniture and real estate and negroes hereinafter specially bequeathed, to be sold at the discretion of my executors hereinafter named, and the proceeds, after payment of my just debts and funeral expenses, to be distributed in the following manner:

I give and bequeath to my beloved wife, Charlotte, my negro woman named Kezia and her two children, and such portion of household and kitchen furniture as she may, in her opinion, require for her own use. I also give and bequeath to my said wife Charlotte, during her life, my dwelling house, with its appurtenances, and the land adjoining the same, between Walker street on the north, Fenwick street continued on the south, McKinnie street on the east, and Meigs' line on the west; and at the death of my said wife, it is my will that my said dwelling, appurtenances and the land within the above described bounds, shall descend to my nephew, John Nelson and his heirs. I also give and bequeath to my said wife Charlotte, one-third part of all the rest and residue of my estate, not heretofore divided away, to be paid to her within a reasonable time after sale of my estate.

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My will and desire is, that one other third part of my estate, not hereinbefore divided away, may be equally divided between my brother Peter and all my nephews and nieces, and the three children of my beloved wife Charlotte, to be paid to them as soon as convenient, after the sale of my estate.

My will and desire further is, that the remaining third of my estate, not hereinbefore divided away, may be disposed of as follows: that is to say, that the sum of two thousand dollars be invested in stock by my executors hereinafter named, and that the income of the same be remitted annually to the Trustees of the Braithwaite School in the Parish of Ripon, and county of York, in England, for the use of said school, and for the purpose hereinafter mentioned. The trustees of said Braithwaite School to be elected tri-annually by the parents and guardians of the children legally entitled to the use of said school, and said trustees to have a vote in the selection of the teacher or teachers, and to have the privilege of admitting to the use of the school, ten poor scholars, whom he considers the most deserving.

My will also is, that the first year's income of said income, may be applied to the repair of said school house and its appurtenances, and that of the income of all subsequent years from said sums, two-thirds be allotted to the teacher or teachers, and the remaining third to be appropriated to paying the expense of three respectable weekly newspapers for the use of the school and the neighboring inhabitants, and the purchase of books for the school, or to form a library and for the purpose of stationary for said school.

My desire is, that the remainder of said third part of my estate, after investing two thousand dollars in stock for the purpose aforesaid, may be applied to some charitable or benevolent purpose or purposes in Augusta, at the discretion of my executors hereinafter named.

I nominate and appoint my said nephew John Nelson and my friend James Harper of Augusta, executors of this

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ceased, against John Nelson and James Harper, executors of said Matthew, for the recovery of the sum of two thousand dollars, with interest, claimed by complainants, as heirs at law, of said deceased, the same being a legacy bequeathed by testator to the trustees of the Braithwaite School in the Parish of Ripon, county of York, in England, and which legacy complainants allege lapsed, and belongs to the heirs at law of deceased.

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I give and bequeath to my beloved wife, Charlotte, my negro woman named Kezia and her two children, and such portion of household and kitchen furniture as she may, in her opinion, require for her own use. I also give and bequeath to my said wife Charlotte, during her life, my dwell-
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same ; that said legacy has remained in the hands of the executors, unclaimed ever since testator's death, now about 18 years ; and that during all that time they have had the use and benefit thereof.

The bill prays that the defendants, as executors, be compelled to account for and pay over to complainants, as heirs at law, the said sum of two thousand dollars and the interest thereon.

The defendants answered the bill, and the cause was tried upon the bill, answer and replication.

Counsel for complainants relied upon the following portions of defendant's answer, as evidence to prove the non-existence of the legatee named in the will, and to establish complainants' right to the same as a lapsed legacy, viz :

- "That shortly after the death of Nelson, in 1839, a copy of his will was forwarded by defendants to Peter Nelson, a brother of testator, residing in the county of York, England, the supposed place of residence of the trustees of the Braithwaite School, in the Parish of Ripon, witht he request that he would furnish them with the copy will forwarded, to the end that there might be a demand for and receipt of the amount of said legacy, under said will."

"That several years after, a letter was received by defendants, which has been lost or mislaid, and writer's name not recollected, but the writer professing to have authority from the trustees to receive payment of said legacy. But defendant, John Nelson having doubts as to the character and authority of the applicant, wrote to him, by advice of counsel what was necessary, *but no answer* was ever received."

"That since the filing of this bill, the defendant, John Nelson had written to one John Nelson of the county of York, England, a nephew of the testator, asking his aid, and through him, that of others, in putting in movement, the party or parties entitled to the legacy, but all efforts to attain that end, have, so far as these defendants are informed, been so far unavailing."

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The presiding Judge charged the jury, "that it was incumbent on complainants to show that no such person as the legatee existed, before the legacy can lapse;" "that this must be shown by evidence, and that there was no evidence adduced, except the answer; that the non-existence of the legatee being charged, it must be proved."

"That if the legacy be lapsed, it becomes a *residuum*, to be divided among the residuary legatees under the provisions of the will; that if the jury find it be a lapsed legacy, it did, in the opinion of the Court, go into the residuum, and if it went there, then the complainants could not recover, and the verdict must be for the defendants, because a residuary legatee could not recover his portion of a residuum alone, but must join all the residuary legatees as parties."

The jury found for the defendants, and complainants except and assign as error the charges of the Court above stated.

JNO. C. SNEED, for plaintiffs in error.

W. T. GOULD, for defendants in error.

By the Court.—McDONALD J., delivering the opinion.

The bill in Chancery, on the trial of which, the errors assigned are alleged to have been committed by the presiding Judge in the Court below, was instituted by the complainants claiming, as having lapsed, the legacy of \$2000 directed by the testator to be invested in stocks, the income of which was directed to be paid to the Braithwaite school in York county, England, and alleging that the complainant, Charlotte Silcox, is the heir at law, of the testator, and under that title, insisting that the said sum and its accumulations, belong, of right, to her, and praying that it may be so decreed. The answer claims that if the legacy has lapsed, it fell into the general residuum, and is distributable as the will directs. The

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cause went to trial on the bill and answer. The points submitted by complainants' counsel, the parts of the answer relied on by them, the charge of the Court below, and the exceptions thereto, presented to this Court as assignments of error, are set forth in the statement of the case.

[1.] The charge of the Court in regard to the proof of the lapse of the legacy is correct in all respects. A complainant, who claims, as heir at law, a legacy, which he alleges, has lapsed, because of the non-existence of the legatee named in the will, must entitle himself to it by clear and satisfactory proof of that allegation. The proof relied on in this case, shows that but little effort was made by the executor or any one else, to prove the existence or non-existence of the legatee entitled to the two thousand dollars under the will. Indeed, as far as it goes, it establishes a strong probability, that by the use of a little diligence and effort, the legatee might have been found.

[2.] We think the Court erred in charging the jury, that if the legacy be lapsed, it becomes a *residuum*, to be divided among the residuary legatees, under the provisions of the will. Where the residuum is given in distinct parcels, as in this case, or, to several as tenants in common, it is to be inferred that the testator did not intend that lapsed legacies should fall into the residuum, but it is to be presumed in such case, that he had expressed all that each residuary legatee should take. The case of *Loyd vs. Loyd*, reported in 4 *Beavan*, 231, is very like this. There, the residue was to be divided in three portions, and one third was given to A. another third to B., and, as to the other third, £500, part thereof to C., and the residue and remainder of such third to other parties, and C. died in the life time of the testatrix. It was held, that the £500 lapsed to the next of kin.

[3.] From the interpretation of this will, it follows that the residuary legatees cannot be interested in the question of lapse, and are not, therefore, necessary parties.

Judgment reversed.

EZEKIEL CLIFTON, plaintiff in error, vs. JOHN LIVOR, et al., defendants in error.

[1.] If a party is prevented by sickness from appearing at the proper Court, at the proper time, to make his defence at law, he is entitled to relief in a Court of Equity.

[2.] No appeal lies from a rule absolute awarded by *the Court*, for the foreclosure of a mortgage.

[3.] Where a defence is purely equitable, a party is not foreclosed from asserting his right, by suffering judgment *at law* to go against him.

In Equity, from Emmanuel Superior Court. Decision by Judge HOLT, at chambers, October 2, 1857.

This was a bill for injunction and relief, filed by Ezekiel Clifton, against John Livor.

The bill alleges that Livor, of the State of New York, applied to complainant, and represented to him, that he could, by a *new process*, teach him, in the space of 60 days, a thorough knowledge of surveying, etymology, syntax, single and double rule of three, analysis, interest, discount, loss and gain, equation, partnerships, square-root, book-keeping, and simple equations of algebra. That complainant, an uneducated man, and relying upon the representations and promises of said Livor, entered into an agreement with him, to teach complainant the said branches of an education, and in consideration thereof, executed and delivered to him twenty (20) promissory notes, each for thirty dollars, amounting in the whole to the sum of \$600; and for the security of the payment thereof, executed to Livor a mortgage on two tracts of land, containing about 780 acres, situated in the county of Emmanuel.

That Livor, on his part, executed and delivered to complainant, the following instrument of writing, viz: .

GEORGIA, EMMANUEL COUNTY.

I, John Livor, do agree to teach, from the 20th January, 1851, for the term of 3 months, considering twenty days as

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one month, to Ezekiel Clifton, for the purpose of imparting the following branches: 'The art commonly used for surveying, etymology and syntax' of E. grammar, C. arithmetic, consisting of the single and double rule of three by analysis, interest, discount, loss and gain, equation of time, partnerships and square-root, also the art of book-keeping, and the simple equations of algebra.

Furthermore, the said Ezekiel Clifton is empowered to follow me up, for the purpose of being taught and improved in the above branches, after the expiration of time above mentioned, free of charges. I also agree that all notes I hold against Ezekiel Clifton, shall be null and void, if I do not comply with the terms above mentioned.

The school is to begin on the above date.

JOHN LIVOR.

The bill further states, that Livor, after teaching only twenty days, left for parts unknown, and wholly failed to teach complainant the branches enumerated in said agreement, and took with him the notes and mortgage, obtained upon representations which turned out to be false and fraudulent.

That afterwards, said Livor, by his attorney, A. H. H. Dawson, at the October Term, 1855, of Emmanuel Superior Court, procured a *rule nisi*, returnable to April Term, 1856, to foreclose said mortgage. That for providential causes said April Term was not held, and complainant, therefore, had no opportunity to make his defence. At the September Term, 1856, complainant was too sick to attend Court, until the evening of the second day of the Term, and before his arrival said *rule* had been made absolute, although his counsel had moved the Court to allow complainant until the last day of the Term to file his defence, and which was refused.

That upon said judgment of foreclosure a *fi. fa.* issued, and was levied upon the mortgaged premises, which were sold on the first Tuesday in March, 1857, by the Sheriff of Emmanuel county, who, by the direction of A. H. H. Daw-

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son, attorney for Livor, bid off said land for Dawson, at and for the sum of nine hundred dollars; said Dawson not being present himself, or by any agent save the Sheriff. That no money has been paid by Dawson upon his said purchase, and no titles made to him by said Sheriff, and complainant is still in possession of the premises, but Dawson is threatening to turn him out.

The prayer of the bill is, that Livor and his attorney, Dawson, be decreed to surrender said notes and mortgages, and that that they be declared null and void and cancelled; that the judgment of foreclosure and *fi. fa.* thereon, be annulled and set aside. That said sale be declared a nullity, and said defendants be perpetually restrained and enjoined from further proceedings under said judgment and *fi. fa.*, and under said illegal sale of said premises.

Upon hearing the bill, the Chancellor made the following order, to-wit:

Read, considered and sanctioned, as far only as relates to the sale under the mortgage *fi. fa.* complained of. Let subpoenas be issued as prayed for, and an injunction to restrain all further proceedings under said sale. The injunction to continue until the further order of the Court.

(Signed,) WM. W.^r HOLT,
Judge S. C., M. Dist.

To which order, counsel for complainant excepts, because the same is only a partial one, and extends only to the sale made by the Sheriff and the proceedings thereon, whereas, the prayer of the bill is to enjoin and restrain defendants from any proceedings in the premises.

W. B. GAULDEN, for plaintiff in error.

A. H. H. DAWSON, for defendants in error.

By the Court.—LUMPKIN, J. delivering the opinion

This was an application by bill for relief and injunction.

It charges, that on the 20th day of January, 1851, one John Livor, of the State of New York, applied to the complainant, and represented to him that he could, by a *new process*, teach complainant in the space of sixty days, a thorough knowledge of surveying, etymology, syntax of English grammar, single and double rule of three, analysis, interest, discount, loss and gain, equation of time, partnerships and square-root; also the art of book-keeping, and the simple equations of algebra!!! Furthermore, the complainant is "empowered to follow" the said Livor "up," for the purpose of being improved in the above branches, after the expiration of the time mentioned in the contract, free of charge. The said Livor also agreed that all notes held by him against complainant, should be null and void, if he did not perform his part of the undertaking.

The bill charges, that Livor taught twenty days only, or one-third of the stipulated term, and left the country for parts unknown; and that he wholly failed to teach complainant the branches enumerated in his written articles. There is an acknowledgment upon the agreement, of the payment of twenty days, viz: one month's tuition, commencing from the 20th January, 1851.

The bill further charges, that the complainant being an uneducated man, and relying upon the promises of Livor, made and delivered to him twenty promissory notes, each for thirty dollars, amounting in the whole to the sum of \$600; and for securing the payment thereof, the complainant executed to Livor, a mortgage on two tracts of land, containing about 680 acres, lying in Emmanuel county.

The bill also states, that at the October Term, 1855, of the Superior Court of said county, Livor, by his attorney, A. H. Dawson, Esquire, obtained a *rule nisi* to foreclose the

mortgage charged to have been falsely and fraudulently procured by Livor from the complainant, which *rule nisi* was returnable to the next April Term, 1856. That owing to providential causes that Term of the Court failed, and that at the September Term, thereafter, complainant was too sick to attend Court until late in the evening of the second day of the Term; and that when complainant arrived, the *rule* had been made absolute, although complainant alleges, that he was informed by his counsel that he, in his behalf, had urged upon the Court to allow complainant until the last day of the Term, to file his affidavit in terms of the law, which the Court refused.

The bill further states, that but for the sickness of the complainant, which prevented him from attending Court, he could have made it appear that the mortgage so foreclosed, was not only fraudulently procured, but that Livor, the mortgagee, utterly failed to comply with his part of the agreement, and with the conditions upon which he obtained said mortgage.

It further appears from the bill, that upon the *rule* absolute, a *fi fa.* was issued and levied on the mortgaged premises, which were sold and bought in by one John Overstreet, the then Sheriff of Emmanuel county, Mr. Dawson, the attorney of Livor, not being present bidding by himself or any agent; neither did he pay any money for the land. That no title has been conveyed by Overstreet; that Clifton, the complainant, is still in possession, but that he is threatened with eviction by Mr. Dawson, the attorney for Livor.

Upon these allegations in the bill, the Court granted the injunction, so far only as relates to the sale already made by the Sheriff. And the only question now is, whether, according to the case made, the complainant is not entitled to further relief? In other words, is he not entitled to be let in to the defence of the contract itself; and to avoid it if he can, for fraud, failure of consideration, or any other cause?

We need not characterize this contract; it characterizes

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itself. It is stamped upon its face with the grossest imposition on the one part, and the blindest credulity on the other. It proves, to be sure, that the "schoolmaster is abroad," but such a schoolmaster! It shows another fact, that the people of Georgia are longing to eat of the fruit of the Tree of Knowledge. The State owes it to herself to supply them with competent teachers.

We need not remark, that no appeal could have been entered from the rule absolute awarded by *the Court*, in this case. It has been gravely doubted whether the mortgagor, upon a rule to foreclose, is entitled to make any other defence than that specified in the statute, and that is, that he is entitled to payments which have not been credited upon the mortgage, or to set-off, which in equity ought to be allowed. True, this Court has put a more liberal construction upon the judiciary Act of 1799, prescribing the mode of foreclosing mortgages on real estate. Still, it makes no express provision for forming an issue to be tried by a jury. In short, it does not directly provide a common law remedy. We are inclined to think, therefore, that the mortgagor is entitled to go into equity, to make his defence available, especially if, as in this case, he is entitled to special relief, namely, to have his notes and mortgage delivered up to be cancelled, that they may no more encumber his property. If this be so, the complainant cannot be said to have had his day in Court. And he has lost nothing by suffering judgment *at law* to go against him.

[1.] But waiving all these views, we meet the question broadly and inquire, does not the complainant render a sufficient excuse for failing to file his defence *at law*? He is not responsible for the miscarriage of the Court at the Spring Term, 1856; and he was prevented by sickness from arriving in time at the Fall Term thereafter, to make his defence; a stubborn sworn *fact*, whether brought to the knowledge of the Court at the time of the foreclosure or not. He was not bound to make it before. And even if he were, it was his privilege, under the Act of 1853, to amend his defence, at the

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September Term, 1856, or at any other stage of the cause. And it is against just such accidents that a Court of Chancery will grant relief. More especially will it interpose to give to the deluded victim of this transparent imposture an opportunity to defeat a demand which, if one statement only in the bill be true, is absolutely null and void. For Livor, by going off and failing to teach the stipulated term, forfeited his contract. He has already been paid for the month he taught, and this, under the agreement, is that much more than he was entitled to receive.

In every view of the case, therefore, we hold that the Judge erred in not granting a *general* instead of a *partial* injunction.

Judgment reversed.

JAMES A. BROWN and wife, plaintiffs in error, vs. THE SAVANNAH MUTUAL INSURANCE COMPANY, defendant in error.

[1.] A valid legal objection to the payment of a loss on a policy of Insurance, is not a waiver of all other objections, if the plaintiff go into equity to avoid the effect of that objection at law.

[2.] A shorter period than the statutable period for the institution of suits, by agreement of the parties in their contract, violates no principle of public policy, so long as it is not so unreasonable as to raise a pre-
vantage in some way.

Superior Court. Decision on
at May Term, 1857.

Judge FLEMING, on the follow-

venture, and as a single woman,
effected an insurance in the Sa-

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vannah Mutual Insurance Company, for six hundred dollars, on a stock of groceries, located in Robertsville, which is a part of the city of Savannah.

In her written application for the insurance to the said company, she described the store, in which said stock of groceries was, as "Lot No. 14, Walton Ward, (Robertsville) fronting on Stewart street." After her loss by fire, she discovered that the true description of the lot, upon which the store was situated, was "Lot number fourteen (14,) part of Garden Lot number eleven (11,) West, Walton Ward, in the city of Savannah," and that there was no store or house of any kind upon the lot designated in the policy. She applied to the Insurance Company for payment of her loss, but she was told that the policy was null and void, and that they would not pay the loss, because they were misled by a misdescription of the premises wherein the said stock of groceries were located.

The complainants filed a bill against the Savannah Mutual Insurance Company, stating the policy of insurance, the payment of the premium demanded by said company, to-wit: eighteen dollars, and that they had given such a full, complete and satisfactory description of the location of the store in which said stock of groceries was, as to leave the said insurance company in no doubt as to the position of the store, or the nature of the risk which they were taking; and furthermore, that it was the custom of insurance companies, where they were at all in doubt, to examine the premises insured, for themselves.

The bill charges a *bona fide* loss by fire, on the 19th of August, 1854, to the amount of six hundred dollars, and that complainants applied verbally for the payment of such loss, or so much thereof as should appear to have been suffered, and that defendant refused to pay either the whole or part, because the policy was null and void by reason of a misdescription of the premises

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To this bill the defendant filed a general demurrer, for want of equity, and the points taken were that the bill could not hold :

1st. Because complainants had a complete and adequate remedy at law.

2d. Because of the eighth condition, attached to the policy of insurance, which reads as follows :

“VIII. All persons insured by this company, and sustaining loss or damage by fire, are forthwith to give *notice thereof* to the company, and as soon after as possible to deliver in a particular account of such loss or damage, signed with their own hands, and verified by their oath or affirmation, and also, if required, by their books of account, and other proper vouchers. They shall also declare on oath whether any or what other insurance has been made on the same property, and procure a certificate under the hands of three freeholders, a magistrate, notary public or clergyman (most contiguous to the place of the fire, and not concerned in the loss) that they are acquainted with the character and circumstances of the person or persons insured; and that having investigated the circumstances in relation to such loss, do know and verily believe that he, she or they really and by misfortune, without fraud or evil practice, hath or have sustained, by such fire, loss or damage to the amount therein mentioned, and until such proofs, declarations and certificates are produced, the loss shall not be payable. Also, if there should appear any fraud or false swearing, the claimant should perfect all claim by virtue of this policy.”

This, it was contended by the defendant, barred all complainants' claim, because they had not complied with the 8th condition of the policy, in furnishing the preliminary proof.

3d. That the 13th condition of the policy barred the claim of complainants, which reads as follows :

“XIII. It is furthermore hereby expressly provided, that no suit or action of any kind, against said Company, for the recovery of any claim upon, under or by virtue of this policy

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shall be sustainable in any Court of Law or Chancery, unless such suit or action shall be commenced within the term of six months next after the cause of action shall accrue; and in case any such action shall be commenced against said Company, after the expiration of six months next after the cause of action shall have accrued, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim, thereby so attempted to be enforced."

After argument, Judge FLEMING sustained the demurrer: and complainants by their counsel excepted, and tender their bill of exceptions, and say that the Court erred:

1st. Because the verbal application of complainants for the payment of loss was such a notification as contemplated by the 8th condition of the policy, and the refusal of defendant to pay said loss, on the ground that the policy was null and void by reason of the misdescription of the premises was a waiver of the preliminary proof.

2d. Because the 13th condition of said policy is contrary to law and public policy.

S. P. HAMILTON, for plaintiffs in error.



WARD, OWENS and JONES, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

[1.] The first assignment of error in the decision of the presiding Judge in the Court below, presented in this record, cannot be supported. The objection made by the defendant to the payment of the loss, was, *prima facie* a good one, and insuperable in a Court of Law, as is manifest by the complainant's resort to a Court of Chancery for relief. It cannot be that a *valid legal objection* to the payment is a waiver of all other objections; or that the plaintiffs should be entitled to recover, without the proof required by the stipulations in their policy, if they could remove the objection.

made, by application to a Court of Chancery. The object of the bill is, in effect, to reform the policy, as to the description of the property, and to obtain a decree for the amount of the loss. The alleged mistake in the description of the property, and that alone gives a Court of Equity jurisdiction of the cause, and having jurisdiction, it will make a full decree so as to settle finally the rights of the parties. But the complainants must go on and make out their case quite as fully as if they were suing at law, and the objection which sent them into equity cannot be invoked as an admission by the defendant of a liability to pay whatever was demanded, or as a waiver of any of its rights.

[2.] The next assignment of error is upon the decision of the Court on the 13th condition of the policy of insurance. The Court held that said condition was not contrary to law and public policy. The rule is that a condition in a contract which is either *mala prohibita* or *mala per se* is void, and cannot be enforced. If it do not contravene public policy it is good. No principle of public policy is violated by a condition in a policy of insurance, that the injured party shall sue within six months from the time of the loss or lose his remedy. There is no reason why a party may not enter into a covenant, that for an alleged breach of contract, the injured party shall sue within a period less than that fixed by the statute of limitations as a bar. The statute was intended for the benefit of defendants and is founded upon the presumption of payment, or the loss of evidence which might impeach the plaintiff's right. The parties may fix upon a shorter period, and the stipulation violates no principle of public policy, provided the period fixed be not so unreasonable as to show imposition or undue advantage in some way. The case of *Goldstein vs. Osborne*, 2. Car. & Payne 550, was assumpsit on a policy of insurance. It contained a condition, that if any difference should arise on a claim it should be submitted to arbitration. This claim had not been submitted to arbitration, and it was in-

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sisted that the plaintiff could not recover on that account. The plaintiff contended that the construction of the contract was that the case was to be referred when the difference between the parties was as to the amount claimed, and not when the plaintiff's right was denied altogether. The Chief Justice who tried the cause declared that he would be warranted in awarding a nonsuit, but that it would be better for the interest of the public, to allow the case to go on.

Judgment affirmed.

ALEXANDER ROBERTSON, et al. plaintiffs in error, vs. GEORGE H. JOHNSTON, Trustee, et al. defendants in error.

J. R. died in 1803, leaving a considerable estate. By the 4th item of his will, he declares as follows: "After the foregoing dispositions, I give and bequeath my whole estate, real and personal of what description soever, in manner and form following: To my beloved wife Jane Nesbit, the sole direction of the whole, with the guardianship of my several children by her, until they arrive at the age of twenty-one years, respectively, when each of my children shall receive a share or dividend of my estate, in just proportions by appraisement of my executor, &c., reserving one-third of my estate to the exclusive use of my beloved wife during her life, and at her demise, the said third part to revert to my children, or the survivors, share and share alike, &c. And the 5th item of the will is as follows: Should it be the divine pleasure of Almighty God, to take from this life my dear wife, and all my children, before they arrive at maturity, or in case of their all dying single or childless, then in that case, *what may remain* of my said estate, shall go to my brothers, William, Andrew, Alexander and David, and their heirs, in four equal proportions, &c." *Held*, That under the words of the will, the daughters took a fee, defeasible upon the events of either dying before arriving at womanhood or puberty, or single, or without children; and that an absolute power of disposition could not be implied from the words, "*what may remain*," so as to vest an absolute fee in the children, and that the limitation over to the brothers of the testator was good by way of executory devise.—LUMPKIN, J.

A testator, after bequeathing his "whole estate" to his wife and daughters in certain proportions, added, "should it be the divine pleasure of Almighty

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God to take from this life my dear wife, and all my children, before they arrive at maturity, or in case of their dying single or childless, then and in that case, what may remain of my said estate, shall go to my brothers."

1.] *Held*, First, that the expression, "what may remain of my estate," was not to be so read, as to make it confer on the daughters, the absolute power of doing with the "estate" whatever they pleased; but was to be so read, as to make it confer on them, only a power corresponding to the interest which they took; or so read as merely to make it designate an estate in remainder, and, therefore, as not directly conferring any power at all.—BENNING, J.

2.] *Held*, Secondly, that the word, "maturity," was to be taken by its sense, of *puberty*, and therefore, that there was no sufficient reason for changing the word, "or," into the word *and*.—BENNING, J.

In equity, from Chatham Superior Court. Decision on demurrer by Judge FLEMING, at chambers, August 4th, 1857.

This case was heard upon a transcript of the record, and the following bill of exceptions, which contains all the facts necessary to a full understanding of the decision of this Court.

GEORGIA, CHATHAM COUNTY.

Alexander Robertson, <i>et al.</i>	} In Equity, from Chatham Superior Court, May Term, 1857.
complainants, and	
George H. Johnston, <i>et al.</i>	
defendants.	

Be it remembered that at the May Term of Chatham Superior Court, in the year of our Lord eighteen hundred and fifty-seven, Alexander Robertson and others, complainants, filed their bill on the Equity side of said Court against George H. Johnston, trustee, and Allen R. Wright and others, by which the said complainants averred that James Robertson, late of the city of Savannah, departed this life in the year eighteen hundred and three, leaving a considerable estate, having first made his last will, by the 4th item of which he declared as follows: "After the foregoing dispositions I give and bequeath my whole estate, real and personal of what description soever, in manner and form following: to my be-

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loved wife, Jane Nesbit, the sole direction of the whole with the guardianship of my several children by her, until they arrive at the age of twenty-one years successively, when each of my children shall receive a share or dividend of my estate in just proportions by appraisement of my executors, &c., reserving one third part of my estate to the exclusive use of my beloved wife during her life, and at her demise, the said third part to revert to my children or the survivors share and share alike, &c.

And in the 5th item of the will as follows: "Should it be the divine pleasure of Almighty God to take from this life my dear wife, and all my children before they arrive at maturity, or in case of their all dying single or childless, then in that case, what may remain of my said estate, shall go to my brothers William, Andrew, Alexander and David, and their heirs in four equal proportions." That the said will was duly proved, and that the testator left him surviving his said wife and four children Bellamy, Ann, Sarah and Jane Robertson, all daughters and infants. That the executors named in said will did not qualify, but the whole remained in possession of the widow for the common use until her death, in the year 1823. That after her death, the children of the testator continued to live together and made no division of the estate although they had attained the age of twenty-one years. That Ann and Sarah died some years ago, single and childless, leaving their sisters Bellamy and Jane surviving, and in the possession of the entire estate. That subsequently Bellamy intermarried with one Archibald Campbell, who soon after died, leaving no children, and that subsequently the said Bellamy died childless, leaving her sister Jane surviving and in possession of the entire estate of said testator.

That the said Jane, the then only surviving child of said testator, in the year 1850 intermarried with one Allen R. Wright, and being in possession of the estate, made previously to her marriage a settlement by which she conveyed all the estate of the said testator to trustees for certain uses

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during her life, and at her death to the child or children of the said Allen R. Wright by a former marriage. That in the year 1856, the said Jane, the last of the children of the said testator, departed this life intestate and childless, never having had any child. That George H. Johnston, one of the defendants was duly appointed trustee of said marriage settlement, and has taken into possession all the estate of said testator, which is specially set out in the bill.

That the complainants are the children and heirs at law of William Robertson, brother of testator, and as such entitled under the will, to the estate. That by the will of testator, in the event and upon the contingency which has happened, to wit: the death of the said Ann A. and Sarah Robertson, single and childless, and the death of the said Bellamy and Jane N. childless and without issue, the whole estate of the said testator upon the death of his last child childless and without issue, vested absolutely in the said complainants as heirs at law of William Robertson the brother of said testator, and in the children of David another brother, (if there be any.) That the said defendants might be compelled to discover and account, &c. All which matters and things will fully appear by reference to the said bill of record, and to the said will attached thereto as an exhibit. And be it also remembered, that afterwards, that on the 23d day of May, in the year aforesaid, at the term of Chatham Superior Court, the said defendants, by their Solicitors, filed a general demurrer to said bill for want of equity, and by agreement of counsel for complainants and defendants, the said demurrer was set down for argument at vacation in chambers, and was accordingly duly argued, and that his Honor Judge FLEMING, afterwards on the 4th day of August last, filed his written decision upon the said argument, by which the said demurrer was sustained, and the bill dismissed with costs. And now come the complainants, by their Solicitors of record, within thirty days of the day on which the said decision was filed, and present this their bill of exceptions, complaining of

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said decision, and allege that the said decision and judgments by which the said demurrer was sustained and the bill dismissed are erroneous. That the said bill contains matter properly cognizable in a Court of Equity, and which requires an answer from the defendants.

That the Judge erred in his construction of the will of James Robertson, upon which construction he sustained the demurrer. That the Judge erred in deciding that upon the death of all the children of testator, without ever having had issue, the estate did not vest in those to whom it was devised by the 5th item of the will, and erred in his construction of said 5th item.

That the Judge erred in construing the said will so as to make the limitations effective only in the contingency that all the children of testator had died before arriving at the age of twenty-one, *and* single and childless.

Therefore, these complainants pray that this, their bill of exceptions may be signed and certified, and an order issued to the Clerk of the Superior Court of Chatham County, requiring him to make out a complete copy of the record of said case, and to certify the same, and cause it to be transmitted to the January term of the Supreme Court, at Savannah, that the errors alleged to have been committed may be considered and corrected.

LAW, BARTOW & LOVELL,
PETIGRU & KING,

Solicitors for complainants.

LAW, BARTOW & LOVELL; PETIGRU & KING, for plaintiffs
in error.

WARD, OWENS & JONES, for defendants in error.

By the Court.—LUMPKIN, J. delivering the opinion.

Seldom has the same amount of legal learning and ability been exhibited in this Court, as in the argument of the case

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at bar, and yet after all, it must be confessed, that the decision must depend mainly, if not entirely, upon the meaning of a single word, in the 5th item of the testator's will.

The following are the two items of the will of James Robertson, nephew of the great historian, under which the questions arise, made by the bill and demurrer.

"Fourthly: After the foregoing dispositions, I give and bequeath my whole estate, real and personal of what description soever, in manner and form following: To my beloved wife, Jane Nesbit, the sole direction of the whole, with the guardianship of my several children by her, until they arrive at the age of twenty-one years successively, when each of my said children shall receive a dividend or share of my estate, in just proportion, by appraisement of my executors, or the survivors of them, reserving one-third part of said estate, to the exclusive use of my said wife Jane Nesbit, during her life, and at her demise, the said third part to revert to my children, or the survivors, share and share alike; and in the event of the death of my wife, during the minority of the whole, or any of my children, I then request of my executors or the survivors of them, to undertake the guardianship of said minor or minors."

"Fifthly: Should it be the divine pleasure of Almighty God to take from this life my dear wife, Jane Nesbit, and all of my children before they arrive at maturity, or in case of their all dying single or childless, then and in that case, what may remain of my estate shall go to my brothers, William, Andrew, Alexander and David Robertson and their heirs, in four equal proportions."

The testator left surviving him, his wife and four children, Bellamy, Ann, Sarah and Jane Robertson, all daughters and infants. And the whole estate remained in possession of the widow, for the common use, until her death in 1823. After her death, the children continued to live together, making no division of the estate. Ann and Sarah died some years ago, single and childless, leaving Bellamy and Jane,

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surviving, their sisters, and only heirs at law, and in possession of the entire estate. Bellamy Robertson intermarried with Archibald Campbell in 1840. Archibald Campbell died in 1844, leaving no child, but his widow surviving him, who as his sole heir at law, became entitled at his death again to her portion of the estate. Subsequently, in 1847, Bellamy died childless, leaving her sister Jane surviving, and in possession of the entire estate of their common father. In 1850, Jane intermarried with one Allen R. Wright, and being in possession of the estate, made previously to her marriage a settlement by which she conveyed all the estate of said testator to trustees for certain uses, during her life, and at her death, to the child or children of the said Allen R. Wright, by a former marriage. In 1856, Jane, the last of the daughters, died, never having had a child, and the question is, whether the children of William Robertson, a brother of James Robertson, the testator, or the children of Allen R. Wright by a former wife; and a progeny wholly foreign to his house and lineage, are entitled to the estate of James Robertson.

The construction we put upon the 4th and 5th items of the testator's will is this: By the 4th item the daughter's of the testator took an estate in fee, which vested immediately, but to be kept under the control of the mother as guardian, until each successively arrived at the age of twenty-one, when the share was to be given off. But the testator reflecting, that these daughters, who were infants, might die at an early age, or single, or if married, childless, qualifies the estate given by the 4th item, and provides that should either of these events happen, namely; should all of his daughters die before *maturity*, that is, as we think, before becoming marriageable, or die single at any age, or if married, die childless, then the estate in remainder, should go over to his brothers. In other words, the daughters took a fee, subject to be divested, upon the happening of any one of the contingencies above specified. By the 4th item of the will, the testator is providing for his immediate family; and looks no fur-

ther. By the 5th item, he extends his dispositive scheme beyond the immediate family and looks to his blood in the collateral line, as the ultimate recipients of his bounty, and standing next to his children in his affection, should offspring from his own loins fail.

We have listened to an elaborate discussion, the object of which was to show, that "or," is to be construed "and," in the 5th item of the will; and that consequently, the testator by the words, *before maturity, or single, or childless*, intended that all the contingencies mentioned, should happen, before the estate granted could pass by way of an executory devise. And a mass of authority is cited in support of this proposition. And even our usually calm and tranquil-minded brother Fleming, waxes warm and earnest, when he comes to treat of this point. "By the 4th item," says he, "the estate vests absolutely in the children at twenty-one." By the 5th item, if they all die *before maturity, or single or childless*, the property is to go over. Now restrict the words *single or childless*, to death before maturity, and the two items are perfectly consistent. Why then not do it? why make the testator inconsistent with himself, when our duty is just the contrary? The answer if I have understood the argument of counsel is, because it would be doing violence to his language. That the testator having used the disjunctive "or" we may not make it "and." To this, I reply, that "or" becomes "and," when the context requires it, "or" becomes "and," when it is necessary to carry out the intentions of the testator. This rule of construction is not denied; on the contrary, it is admitted. Let us then apply it. If "or" is not construed as "and," then the property will go over, *if either one of the contingencies happen*. There is no escape from this conclusion. Indeed this is the position contended for by complainants counsel. Suppose then, all the children had died before maturity, one of the contingencies would have happened, and the property would go over, *although they did not die single, and although they*

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did not die childless. Is there a Court in the world, that would not make "or" "and," to avoid such a result? Does not the clear meaning and intention of the testator require it? Does any one doubt, can any one doubt, that the testator meant his property to go to his grand-children, rather than to his brother's, even if his children should die before maturity? But this clear intention, would be defeated, unless "or" be made "and." Now if "or" be made "and," if the children die before maturity, leaving children, then it is, "and," if they die single; and it is "and" if they die childless. "Or" cannot be "and," as to one of the contingencies, and "or," as to the others. What Court would hesitate to make "or," "and," if this were a contest between the grand children and the brothers?"

This quotation from the opinion of our learned brother, sets forth the defendants case in all its strength, and contains the substance of the reasoning of all the authorities upon this subject, as well as the ground upon which the rule was adopted. A rule of law beginning with the case in *Cro. Eliz.* 525, and coming down to the present time; and which declares that a devise to one and in case of his death, under twenty-one, or, without issue, over, the word "or," is construed "and," and the estate does not go over, unless both the specified events happen. The case in *Croke*, was a devise to A. and his heirs, and if A. died within the age of one and twenty years, or without issue, then over. The devisee died under twenty-one years of age, leaving issue a daughter. It was held that *or* must be construed *and*, otherwise the issue would be defeated; but as the testator intended a benefit to the issue through the parent, the intention would be carried out, and the issue protected, by changing the disjunctive into the copulative. This case we repeat, illustrates the origin and reason of the rule. (1. *Jarman on wills* 416.)

How plausible, and yet how fallacious the reasoning which would apply such a rule, and the principle upon which it is founded, to the case before us!

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If the same end can be attained, that is the preventing the immediate decendants of the testator from being cut off by an exposition which saves the necessity of changing the words of the will, and reading *or* for *and*, and requiring all three of the events mentioned in 5th item of the will, to concur, to arrest the estate from going over, and one too, which the context shows, would much better subserve the intention of the testator, is it not the duty of the Court to adopt it? And all this we accomplish by interpreting the word, *maturity*, in the 5th item of the will, to mean *puberty* instead of *legal majority*, or twenty-one years of age. Why not give it this meaning? If the testator intended the latter, why did he not employ the same terms used in the 4th item of his will, to convey that idea? The truth is apparent, that in the 5th item of his will he was contemplating the various changes which might attend his daughters in the future. He foresaw that they all might die, before being marriageable, in which case of course, there could be no issue; and in *that event*, his will is, that his estate should go over to his brothers. And by this simple view, the whole fabric of the argumentation, raised with so much skill and labor on the other side, tumbles to the ground. He further saw, that notwithstanding his daughters might attain to maturity, they might not marry, either before or after arriving at the age of twenty-one years, or if married, that they might die childless, and in either of these events, his will and wish was, that his estate should go over to his brothers. By this construction, if there be descendants, their interest is protected; why then change and torture and twist the language of the will to effect an end, which is accomplished without it? why make a substitution of words for a purpose which does not exist? why enforce a rule, when the result is, instead of retaining the estate in the family of the testator, to carry it out of his kith and kin, and over to strangers? Would the testator, if in life, desire such a change? Would he prefer these strangers to his blood to have his estate, in preference to his brother's

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children? And in the glowing language of our brother FLEMING, "is there a Court in the world, that would make "or," "and," to produce such a result? Does not the clear meaning of the testator forbid it? Does any one doubt; can any one doubt, that the testator meant his property to go to his nephews and neices, rather than to the children of a son-in-law by a former wife, if his children should die before puberty, or single, or childless? But this clear intention would be defeated, if "or," be made "and."

And when it is eloquently asked, "what Court would hesitate to make "or," "and," if this were a contest between the grand-children and the brothers?" we reply, in the first place, that under our construction of the will, no such contest could ever arise, under any state of facts; and secondly, in return, we ask, what Court should not halt and hesitate long, to make "or" "and," in a contest between the brothers' children, and the children of Allen R. Wright, by a former wife, before intermarrying with the testator's daughter, with whom he wedded at an advanced period of his life, and with whom he lived six years only?

Why should this or any other Court apply a rule, which has been established to keep the estate in the family, to a case which would take it from them? It would be unreasonable to do so. However ready and willing we might be to administer the rule, provided *issue* were before the Court. We do not feel imperatively called on to execute it, where not only the actual facts as they exist, do not demand it, but where even the abstract principle is left intact, by our interpretation of the words of the will. And that is by expounding the word maturity in the 5th item of the will, to mean puberty, and not twenty-one years of age. And it is not disputed by counsel for the defendants in error, that it may mean *womanhood* and not *legal majority*. We are called on to decide in what sense did the testator use the word? Arrival at age instead of arrival at womanhood, may be the more ordinary legal acceptance of the term *maturity*; still,

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if the whole will or context shows that it was the intention of the testator to use the term in the other sense, that meaning must prevail. And that such was the mind of the testator, we are well satisfied.

Again, it is contended, that an absolute power of alienation was vested by the testator in his children, by the language of the 5th item of the will; "what may remain of my estate shall go to my brothers," &c., and that consequently, the daughters took an absolute fee in the estate, and that neither a remainder nor an executory devise, could be limited over, upon such an estate; and 15 *Ga. R.* 457; *Idé vs. Idé*, 5 *Mass. R.* 500, 504; 10 *Johns R.* 19; 16 *Johns R.* 587, 590; and 4 *Kent*, 270, are cited in support of this proposition. And it is not denied, but that the words used may admit of this construction. They do not however, necessarily require this construction and none other. Certainly none of the cases referred to are exactly parallel with this. Take for instance, the Massachusetts case of *Idé vs. Idé*, where the testator undertakes to give over, what the son "might leave." The phraseology is very different from giving over, "what may remain." The former must refer to the action of the first taker; and by necessary implication perhaps, as was said by Chief Justice Parsons, confers upon the son the power of disposition. Whereas, in the case at bar, the words "what may remain," may mean, and we are inclined to think do mean, so much of the estate, as may survive its ordinary use, wear and decay. The testator merely intended to signify his wish, that his wife and children should use the property freely without being impeachable for waste, &c. (1 *Hill, S. C. R.* 370, 371; 2 *Hill S. C. R.* 521. This expression looks rather to the partial consumption of the estate, than its alienation. The testator must be presumed to have foreseen the possibility, that the whole estate might go over to the remainder-men by the death of his wife and daughters, before the latter arrived to womanhood. He did not, therefore ~~he could~~ not have intended to, bestow upon his children the

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unrestricted power of disposition, during their infancy. Besides holding as we do, that the daughters took a fee, defeasible upon the event of their dying without children, and as that contingency could only be realized at their death, since in legal contemplation as long as they lived, they might have children; this construction negatives necessarily an intent on the part of the testator, to use the words, "what may remain," in the sense of a power of disposition: And if that power cannot be implied from those words, then the limitation over is good, by way of executory devise.

Neither counsel nor the Court below seem to have attached much importance to this point.

BENNING J., concurring.

The fifth item of the will is as follows: "After the foregoing disposition I give and bequeath my whole estate, real and personal of what description soever, in manner and form following: to my beloved wife, Jane Nesbit, the sole direction of the whole with the guardianship of my several children by her until they arrive at the age of twenty-one years successively, when each of my children shall receive a share or dividend of my estate, in just proportion by appraisement of my executors, &c., reserving one third part of my estate to the exclusive use of my beloved wife during her life, and at her demise, the said third part to revert to my children or the survivors share and share alike," &c.

Under this item, the daughters took, I think, the fee or absolute interest, in the whole property, less an estate in one-third of it, to the wife for her life. I shall use the word fee, as including personalty, as well as realty.

The daughters all survived the mother, I believe, and, therefore, the word "survivors," cannot affect the conclusion, although it may be true, that that word, might in possible events, have affected it, so far as the third given to the wife is concerned.

I believe the Court is unanimous in the opinion, that this is what the daughters and the wife took, under the fourth item of the will. The reasons for this opinion will, doubtless, be stated by another member of the Court. It is, therefore, needless that they should be stated by me, I pass then, to the fifth item.

The fifth item is in these words: "Should it be the Divine Pleasure of Almighty God to take from this life my dear wife, and all my children before they arrive at maturity, or in case of their all dying single or childless, then in that case, what may remain of my said estate, shall go to my brothers, William, Andrew, Alexander and David, and their heirs in four equal proportions."

Did these words have any, and if so, what, effect, on the absolute fee given as aforesaid, to the daughters, in the fourth item?

It is said, for the defendants in error, that these words had no effect at all, on that absolute fee; it is said, that by the expression, "what may remain of my estate," found in these words, a power was impliedly given to the daughters, to do with the property as they pleased, and, it is argued, that the gift of such a power, is, itself, a gift of the absolute fee.

Was such a power, or any power, impliedly given to the daughters, by that expression?

The expression is susceptible of three readings: 1st, a reading, making it give to the daughters, absolute power over the property;—2dly, a reading, making it give to them limited power over the property; viz: a power limited by the interest which they took in the property; 3dly, a reading, giving to them no power at all, but merely designating an estate in remainder.

To say that the first is the true reading, is, according to the defendant's counsel themselves, to make the limitation over, void—the limitation to the brothers.

But it is a rule, that any reading that would make void, a part of an instrument, is to be rejected, if possible.

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That the expression is quite as susceptible of the second reading, or even of the third, as it is of the first, seems to me clear. "What may remain of my estate," may as well mean, what may remain after the daughters have done with it, only whatever the degree of interest they have in it, may authorize them to do with it, as it may mean, what may remain, if anything, after they have done with it, whatever they please.

So, "what may remain of my estate" may, as it seems to me, be as well as any way, taken to be synonymous with "*the remainder* of my estate."

Suppose the testator had first used the following language: "I give all my land and negroes to my four daughters in fee, less an estate in one third of the same to my wife, for her life, and if they should die under maturity, or single, or childless;" and then had added any one of these three forms of expression—; "then, I give the *land and negroes* to my four brothers;" "then, I give *what may remain*, of the land and negroes to my four brothers;" "then, I give *the remainder* of the land and negroes to my four brothers," would he not have conveyed the same meaning? And so far as the negroes are concerned, would not this meaning be more accurately conveyed, by the expression, what may remain, than by either of the others? The negroes might, some, or even all, be dead. All the testator *could* give, would be what *might remain* of the thing given, at the end of the first gift.

[1.] I think, then, that the first of the three readings, is not the one to be taken.

I remark too, that I do not see clearly the *principle* which justifies the position, that the grant of a general power to dispose of property, is equivalent to a gift in fee of the property. A power is not a conveyance. And, feeling this to be a difficulty, I am the more disposed to insist, that at least the existence of such a power, ought, in every case to be, established by express words, or, by *necessary* implication.

It not being true, then, as I think, that the expression, "what may remain of my estate," is to be construed as conferring on the daughters an absolute power over the property, the question recurs, what effect, if any, did the words of the fifth item, have on the absolute fee created, in the daughters, by the fourth item?

And the answer must be, (if I am right as to the expression "what may remain of my estate,") that those words reduced that fee from an absolute, to a conditional fee; that is to a fee subject to be divested, on the happening of some event, or events. I suppose this will not be denied.

The only question, then, will be as to the event or events, on which, the divesting was to take place.

The words of the item are, "should it be the Divine pleasure of Almighty God, to take from this life, my dear wife, and all my children, before they arrive at maturity, or in case of their all dying single, or childless, then in that case, what may remain of my estate shall go to my brothers," &c.

Does this mean that the estate was to go to the brothers on the happening of any *one* of the three events, or, only on the happening of *all* or the three events?

If the word "or," is to be read, or, the meaning is, that the estate was to go to the brothers on the happening of any *one* of the three events; and therefore, that it was to go to them on the daughters all dying childless.

Why should, "or," not be read or? Or, is the word used. In the context nothing is to be found requiring it not to be so read. Is the liberty given, to hunt for intention outside of the words used, when these are plain? At least, such a liberty should not be exercised, except as a last resort.

It is however argued that if we read "or," or, we do that which would in a *possible* case defeat the testator's intention; viz: the possible case of any or all of the daughters dying "under maturity," but yet not dying "childless;" it being assumed that it could not have been the testator's intention, that his property should go to his brothers, whilst there was

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a grand-child of his alive; and, then, it is further argued, that if we read "or," and, we do that which will make it impossible for the estate to go over to the brothers, until all of the three events have happened, and, therefore, that which will make it impossible for the estate to go over to them, if any of the daughters leave a child, whether they die over, or under, "maturity." Thence it is insisted, that we ought to read "or," and. This is the argument; and in support of it, are read cases in which, when property was willed to one person, and if he should die under twenty-one years old, or without a child, then over to another person, it was held that "or" was to be read, and: Most of these cases are stated in Jarman on Wills. 1 *Jar. Wills*, 443.

But to the validity of this argument two things have to be assumed, of which the first is, that the word "maturity," has to be rendered by its meaning, of twenty-one years old; rather than by its meaning, of puberty; for dying under puberty is of necessity dying "childless;" therefore, if the daughters had died under puberty they would have had to die "childless;" therefore if they had died under puberty the case of their dying leaving a child would have been impossible. Yet the word, "maturity," having both meanings, may as well be rendered, puberty, as it may, twenty-one years old.

The second is, that if the taking of a man's words as they are, would in any *possible* case defeat his intention, we are not to take them as they are but to change them into others, although, in the *actual* case, the taking of them as they are, would not defeat his intention.

Any of the daughters might have died under twenty-one years old, and yet not have died "childless." If any of them had so died, and her child were the party prosecuting a suit of this sort, we should have the *possible* case meant. The party suing, is not a child of any of them; none of them ever had a child. This, is the *actual* case.

Now, admit that reading "or," or, would in the possible case, make the testator's property go to his brothers, rather

than to his own daughter's child, and that this would defeat his intention, yet, are we, thence, at liberty to conclude, that reading "or," or, would in the actual case defeat his intention? In the actual case, there is no daughter's child, but only brothers. And what is there, to justify us in assuming, that, although, the testator intended to give his property to his brothers, on his daughters all dying childless, if they died under twenty-one, he, yet, did not intend to do so; on his daughters all dying childless, if they died over twenty-one? Nothing that I can see. On the contrary, is there not enough, to justify us in assuming, that he as much intended to give his property to his brothers in the latter of these two cases, as he did, in the former of the two? I rather think so. There is the word "childless" without restriction; there is the natural bias to one's own issue.

Assume it then to be true, that the testator's intention was, to give his property to his brothers, if his daughters died childless, whether they were under, or over, twenty-one, when they so died. They all did die childless. This is the actual case. Taking "or," as or, would in this, the *actual* case, make the property go to the brothers. That would fulfil the testator's intention. Changing "or," into and, would make the property go to others. That would defeat his intention.

Now are we permitted, to sacrifice the testator's intention in this, the actual case, out of regard to fulfilling his intention in the possible case? The rule allowing, or, to be changed into, and, was made *merely* that intention might be fulfilled. Does it not follow, then, that the rule ought to be applied in those cases in which, it will fulfill intention, and ought not to be applied in those in which, it will defeat intention? Does it not follow, that the application of the rule should be reserved until the coming of the possible case to which, I have referred? See *Wild's Case*, 6. Co. Otherwise, this must follow, that whether the rule will, upon the whole, do more to fulfill, than to defeat, intention, will depend on, whether the cases of donees dying childless under

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twenty-one, are more numerous than the cases of donees dying childless over twenty-one. I incline to think the latter will be found to be the more numerous. Should that be so, then the rule if applied to the latter cases, as well as to the former, would work its own defeat.

I am not prepared to admit then, that this second assumption made by the argument which I am noticing, is any more allowable, than the first was. There are certainly dicta, perhaps decisions, to the effect, that instruments are to be construed in reference to possible cases. This means, I suppose, that if in a possible class of cases, however small, a particular construction would defeat intention, that construction is not to be adopted, although in the actual class of cases, however large, it would fulfil intention; but that another construction is to be adopted, even one which, though it may in the small possible class fulfill intention will in the large actual class defeat intention. I am not prepared to give my assent to any thing susceptible of such a meaning as this.

There is nothing then in the argument under consideration that requires us to read "or," and.

The object to be accomplished by doing that, may be as well accomplished, by reading it as it is, or; and by taking the word, "maturity," by its meaning of puberty. Changing "or" into, and,—nay *two* ors, into *two* ands, would be a "strong measure;" far stronger than taking "maturity," by its meaning, of puberty. Of the two measures then, the latter, I think, is the one to be chosen.

If I am right in these conclusions, and I think I am, the fifth item of the will means, that the estate was to go to the brothers on the happening of any *one* of the three events. All the daughters died childless. Thus one of the three events happened.

William Robertson, one of the brothers, is dead. The complainants are his heirs. A fourth of the estate, therefore, vests in them, and the suit is brought for that fourth. No question is made, as to whether the suit ought not to have

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been brought by his administrator, rather than by his heirs.

In my opinion then, there was equity in the bill, and consequently, error in the Court, in sustaining the demurrer.

McDONALD, J. dissenting.

James Robertson, of the city of Savannah, in the year eighteen hundred and two, made and published his will and testament, the fourth and fifth clauses of which are as follows; viz: "4th. After the foregoing dispositions, I give and bequeath my whole estate, real and personal, of what description soever, in manner and form following: To my beloved wife, Jane Nesbit, the sole direction of the whole, with the guardianship of my several children by her, until they arrive at twenty-one years of age, successively, when each of my said children shall receive a dividend or share of my estate, in just proportions, by appraisement of my executors or the survivors of them, reserving one-third part of said estate, to the exclusive use of my beloved wife, Jane Nesbit, during her life, and at her demise, the said third part to revert to my children or the survivors, share and share alike; and in the event of the death of my wife during the minority of the whole or any of my children, I then request of my executors, or the survivor of them, to undertake the guardianship of such minor or minors." "5th. Should it be the Divine pleasure of Almighty God to take from this life my dear wife, Jane Nesbit, and all my children before they arrive at maturity, or in case of their all dying single or childless, then and in that case, what may remain of my estate shall go to my brothers, William, Andrew, Alexander, and David Robertson, and their heirs, in four equal proportions."

The testator left four children, all daughters. They all attained the age of twenty-one years. Two of them died single and childless, leaving the other two sisters surviving them. One of the surviving sisters married, and having survived her husband, died childless, leaving the other sister surviving

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her. The last surviving sister, on the twelfth day of March, eighteen hundred and fifty, intermarried with Allen R. Wright, of the city of Savannah. Prior to the marriage, she executed a marriage settlement, conveying all the estate and property to Edward W. Solomons, to certain uses and upon certain trusts, for and during her life, and after her death to her own children or child, and the children of the said Wright by a former marriage. By the decree of the Court of Chancery, on the application of the said Solomons, he was discharged from said trust, and George W. Johnston was substituted in his stead.

The four brothers of the testator, named in the will as legatees in remainder, were all dead at the time of the filing of the bill; two of them never married, one of them went to Ireland and is said to have married there, and died, and is supposed to have left issue, but of which fact the complainants allege they have no knowledge. The complainants are the children of William Robertson, one of the brothers, and claim that the whole of the estate left by the said testator, now in the hands of said Johnston, vested in them absolutely and in fee simple, under the provisions of said will, and the issue, if any, of the brother who married and died in Ireland, the children of the said testator having all died childless and without issue. The complainants claim to be entitled to the estate, and pray an account.

The defendants demurred to the bill, and the presiding Judge in the Court below, sustained the demurrer and dismissed the bill, and to this judgment the complainants except, and assign error thereon.

A majority of this Court being of opinion, that the presiding Judge in the Court below committed error in sustaining the said demurrer, reverse his judgment. I think there was no error in the judgment of the Court below, and now proceed to assign my reasons for believing that it ought to be affirmed.

The testator disposes of the principal part of his estate in the fourth and fifth clauses of his will. The fourth clause, in fact, contains a disposition of the whole of that part of the estate to which the parties litigant before us can lay claim. The testator was the draftsman of his own will, and he adopted his own plan of giving expression to his intentions. Like many persons who undertake the same thing, he no doubt thought, that because his purposes and objects were so well understood by himself, it was not necessary to be very particular in selecting language in which to express them, to convey his meaning to others. He perhaps did not know, that by far the largest part of the difficulties springing up in the construction of wills, grows out of a want of perspicuity in the language in which they are written. I think, however, that as awkwardly as the will under consideration is written, the intention of the testator may be collated from it, and, that effect may be given to that intention, consistently with the rules of law.

The testator, in the fourth part of his will, gives and bequeaths the whole of his estate, both real and personal, not disposed of in antecedent clauses. He, however, does not state to whom it is given. The objects must be looked for by examining the entire context. By doing this there can be no doubt. He gives no part of his estate in fee to his wife. When each of his children arrives at the age of twenty-one years, she (the daughter, for his children were all daughters,) is to receive a share of his estate. But still, the whole estate is not to be divided off. One-third of the estate is to be reserved for the use of his wife during her life. At her death, that third part is to revert to his children, or the survivors of them. The wife is to have the direction of the whole of the estate, until distributed agreeably to the above stated provisions. Thus far the wife and children are the sole objects of the testator's bounty; the wife's interest as expressed, is an estate for life, and the children's interest as far as declared, are estates in fee. If the entire fee is not given to the chil-

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dren, it is not given at all, for the brothers named in the fifth clause do not take, except on the conditions therein expressed, on which I shall remark presently. In the sixth clause of the will the testator first appoints his wife executrix, and then appoints four executors, to whom he commits the care of his family and the bringing up his children decently and honestly. The request in this clause is almost equivalent to the appointment of guardians of the persons, at least, of his children. But in the fourth clause of the will, at the time, and in connection with it, that the testator gives the direction of his whole estate to his wife, he appoints her the guardian of his children, and in case of her death during their minority, he appoints his surviving executors their guardians. After the request in the sixth clause, there was no necessity for this, if he did not consider that his estate passed to them under his will during their minority. The appointment of a guardian under these circumstances is evidence, of the testator's intention that the property should vest in the children immediately on his death, except the third part, reserved to the wife, contingently, on their surviving her. The property then, by necessary implication, was given by the testator to his children, to vest in them on his death, in the manner above stated, whether, at that time, they had attained majority or not. If the fee was not disposed of by the will, during their nonage, it must have vested in the wife and children, as the heirs at law of the testator, but it is clear that the testator did intend that the wife should not take more than an interest for life, in any part of his estate, and that the children should take the respective shares to which they were entitled absolutely, and the remainder after the death of the wife in the part reserved for her use, contingently, on their surviving her.

It cannot be questioned that, taking the fourth clause of the will by itself, if either of the daughters had married and died before attaining the age of twenty-one years, leaving a child surviving her, the husband, and if he were dead, the

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child, would have been entitled to her share of the estate. A question might have arisen as to the right of the husband or child to that part of the estate given to the testator's widow during her life, if she had survived the daughter dying in her minority. Instances of estates passing by implication much stranger than that under discussion, may be found in 2 *Peer Williams* 194, *Crowder vs. Clowes*, 2 *Vesey Jr.* 449, &c., &c.

By the fourth clause of the will, therefore, the testator gave the estate, real and personal, therein bequeathed and devised, to his children, except one-third part thereof, reserved to his wife during her life, which was given, on her demise, to such of his children as should survive her. The testator's children were all daughters, they all attained the age of twenty-one years, and all survived the wife, and the whole estate, therefore, vested in them absolutely, unless there is something in a subsequent part of the will to prevent it.

It would, in my judgment, do violence to the intention of the testator, and the words of his will, to hold that the fifth clause of the will reduced the estate of the children to a mere usufructuary interest. The testator knew that his children were all daughters, and that reaching a marriageable age before twenty-one, and they might marry and die, surviving both husband and child, if any, before the attainment of that age. While he did not intend to injure their prospects of marriage, or cut off their children, if any, living at their death, they surviving their husband, he intended to give over to his brothers the entire estate, on condition that they all died surviving their mother, single and childless, before they attained the age of twenty-one years. It is manifest, that if the children had all died, unmarried and childless, before they arrived at maturity, whatever meaning may be affixed to that term, the mother surviving them, the brothers could not have taken any thing under the will, nor could the surviving mother. Nothing was given over in that event. The will making no disposition of the property, it must have been

distributed under the Act for distributing intestates' estates, and the wife or widow would have taken one moiety of the estate, and the brothers and sisters of the testator would have taken the other moiety. The testator having died in 1803, the statute of distributions of 1789 would have governed the descent of the property. That the death of the wife is mentioned in connection with that of the children and is made one of the conditions on which the estate was to go over to the brothers, is strong evidence to my mind, that the testator did not intend to tie up his property in any event, if the children should attain the age of twenty-one years. This opinion, that the testator intended the unrestricted ownership of the property to be in the children, on their marriage respectively before twenty-one, and after that age, whether married or not, is strengthened by the fact that the testator gives over "*what remains*" of his estate on the happening of the contingency on which the brothers were to take. This is the only relation in which he uses that expression. In every other place he speaks of his estate. It is true that this expression would have but little influence, if a life estate only had been expressly given to the children, or if it appeared that the estate consisted of property of a perishable nature. The contrary, however, appears. The will gives the estate, real and personal, and it no where appears that the testator could have referred to a portion of the property likely to be lost or destroyed by the use.

If, on the death of the wife, after the daughters had attained the age of twenty-one years, they being single and childless, the brothers had filed a bill charging that they were entitled to the remainder on their death single or childless; that they were likely to die single or childless, and that they were exercising all the rights of absolute ownership over the property, selling and converting it and the proceeds to their own use, no Chancellor, I apprehend, would have interfered to restrain the daughters, and declare a trust for the brothers. This is putting the case as strongly for the plain-

tiffs in error as they could desire it. The Chancellor would have replied, it seems to me, that, taking the will as a whole, his children were the first objects of the testator's bounty, that admitting that the complainants construed correctly the conditions on which they should be entitled to what the testator bequeathed or devised to them, it could never have been his intention to restrict his children in the use of the property, in a manner to interfere with their complete enjoyment of it, and that all to which the brothers could be entitled was what might remain of the estate after this unrestricted use and ownership of it by the children. What might remain could not be ascertained. It must necessarily have been a matter of doubt and uncertainty, and too much so to authorize a Court to risk the thwarting of the main intention of the testator, to uphold a subordinate and doubtful purpose, when there could be no certainty on the subject. When there is great doubt and uncertainty in such matters the Court will not undertake to execute the will, and for that reason the limitation over to the brothers was void. *Eade vs. Eade et al.*, 5 *Mad. Ch. Rep.*, 118; *Wilson vs. Major*, 11th *Ves. Jr.*, 205; *Sprange vs. Barnard et al.*, 2 *Burn's Ch. Rep.*, 585; *Wynn vs. Hawkins*, 1 *Br. Ch. R.*, 179.

I will now consider the fifth clause of the will in another aspect. If the children had all died childless within the age of twenty-one years, but the survivor of them had married and left her husband surviving, then the brothers could not have taken in remainder. The testator could never have intended that if one of his children had died single, leaving a child, that the estate should go over to his brothers, and yet, if the will is to be construed literally, such must have been the case. The Court, I apprehend, would have hesitated long before it would have held that the brothers were preferred by the testator to his grand-child, if the husband of the daughter had died before her, leaving her single at her death.

There are general rules for construing wills. I do not

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pecial circumstances should induce a departure
id, well established rule of construction. The
s that the intention of the testator shall have ef-
fect, if it be legal. The whole will may be looked to in or-
der to arrive at the intention, and sentences may be trans-
posed and words changed to give effect to such intention,
when it is well ascertained. No one can be so sceptical as to
doubt whether the testator did not intend, in this will, that
the child of the daughter should take, in the case I have put,
instead of his brothers, and yet it would be necessary to
change the word "or" into "and" to enable it to do it. If
"and" should be read for "or," in case of a child, the rule
should be the same, in the event of the marriage and death
of the daughter in the life time of her husband. In each
case, the brothers would be excluded.

While Courts disavow the right to make a will for a tes-
tator, they take considerable liberty with a will as written
to effectuate the intention of the testator. A will is some-
times written by a testator, who is without counsel, and often
in extremis, and the Courts will not allow loose expressions,
badly connected sentences, and incautious language, to de-
feat intentions and purposes, well ascertained by a consulta-
tion of the entire will. There are cases in which the inten-
tion of the testator cannot be ascertained, and then the will,
a provision involved in doubt, cannot be executed. There
are also cases in which the intention may be arrived at sat-
isfactorily to the expounder, and yet it may be so defectively
expressed that the Court could not execute the will according
to the intention, without supplying words so liberally as to
amount to the making of a will agreeably to the presumed
intention. This the Court will not do. The case of *Spal-
ding vs. Spalding*, Cro. Car. 185, is an early instance of a
departure from the letter of a will to give effect to the inten-
tion of the testator. "John Spalding had issue three sons,
John, Thomas and William. He devised land to John, his
eldest son, and the heirs of his body, after the death of Alice,

the deviser's wife; and if John died, living Alice, that William shall be his heir." "John dies, having a son, in the life of Alice. Alice dies and William claims the land." According to the letter of the will he is clearly entitled, yet the Court examining the whole context of the will, determined the case according to the intent of the testator, and that intent was, that if John die *without issue*, living Alice, William should have it.

It is unnecessary to extend this examination, for the purpose of determining whether, if there had been a child, that child could have taken any thing under the will, there being no express gift to it, or whether the parent must not have taken an estate tail, under the English law, descendible to the child, and that under our law, the mother being the first taker, would not have taken an absolute fee simple in the property. According to the construction I place on the will, I have said much that I might have omitted. The estate vested in the testator's children at his death, in the manner I have hereinbefore stated, and the limitation over to the brothers, if good, could take effect only on the death of the wife and children, before the latter arrived at maturity, or in the event of the death of all, single and childless, before they attained the age of twenty-one years.

CASES
ARGUED AND DETERMINED IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT MACON, JANUARY TERM, 1858.

Present—JOSEPH H. LUMPKIN,
CHARLES J. McDONALD, } Judges.
HENRY L. BENNING,

HOLCOMB JOHNSON, et al., plaintiffs in error, vs. WRIGHT BRADY, adm'r, defendant in error.

[1.] A temporary administrator, finding the assets of the estate of his intestate involved with other estates, and likely to be seized and sold, and the proceeds applied contrary to law, ought to ask an injunction until the affairs of the estate can be investigated, and conflicting claims adjusted.

[2.] The widow of intestate claiming a part of the property under an agreement that it should be conveyed in trust for her, and claiming another part of the property by right of survivorship, need not be made a party complainant to a bill filed by a temporary administrator to preserve the assets, as no final decree can be made in the premises.

In Equity, from Sumter county. Decided by Judge LAMAR, December, 1857.

Wright Brady filed his bill for an injunction under the following circumstances:

William M. Brady, the brother of the plaintiff, died in January, 1857, intestate, leaving Julia A. Brady, his widow, and four children; and being very much indebted at the time of his death, though in possession of considerable property. The plaintiff, at the request of the widow, took out temporary letters of administration on his estate. At the time of his

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death, William M. Brady was administrator of the estate of Burton T. Dennard, his brother-in-law. Julia A., the widow of William M. Brady, was the sister of Burton T. Dennard. William Dennard, their father, had died in 1850 or 1851, leaving a will, whereby, after some specific legacies, he had given the whole of his estate to his son, Burton T. Dennard, the brother of the said Julia A. Brady, for whom he made no provision in his said will. William M. Brady and his wife filed a caveat against the probate of the will, upon which considerable litigation ensued, and in the fall of 1852, an agreement was entered into between William M. Brady and his wife, and the said Burton T. Dennard, and Irene Dennard, the executrix of the said will, that William M. and Julia A. Brady should withdraw their caveat, and in consideration thereof, Burton T. Dennard did, by his written agreement, covenant with the said W. M. Brady, in trust for his said wife, that he would, when he came of age, convey to the said W. M. Brady, in trust for his said wife, one-third of the estate of which the said William Dennard died possessed. When the said Burton T. Dennard came of age, he carried out this agreement, by allowing W. M. Brady to carry on the plantation of the testator in partnership with him, but no specific conveyance was ever executed.

The bill also stated that complainant had no means of knowing the amount of the estate of the said William Dennard, nor of the one-third which the said Wm. M. Brady held in trust for his said wife, Julia A., and that the latter had notified him that the value of her third was \$21,629 50, and that the same was in the nature of a trust, and insisted on it as a paramount claim.

The bill further stated, that upon the death of Burton T. Dennard, W. M. Brady was appointed his administrator, with complainant as his security, and that the said B. T. Dennard, at the time of his death, was legally indebted, and that the claims with respect to that estate, were superior to the claims of other creditors.

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He also alleged in his bill, that there were a great many judgments, both against the estate of Dennard, and Brady, and that the judgment creditors were taking proceedings with respect to the property. He, therefore, prayed an injunction to restrain the Sheriff and judgment creditors from proceeding to sell the property until the rights of the conflicting claimants should be ascertained and adjudicated.

An injunction was granted as prayed by the bill.

To this bill the defendants demurred for want of equity, or if there was any equity, it was in favor of Julia A. Brady, who ought to have filed the bill when made a party to it; and also, that the cases made by the bill did not create any trust, or vest the property for the separate use of Julia A. Brady.

The Court overruled the demurrer, and counsel for defendants excepted.

SCARBOROUGH & WORRILL, for plaintiffs in error.

McCoy & Hawkins, *contra*.

By the Court.—McDONALD J., delivering the opinion.

On the death of William M. Brady, his wife, Julia A. Brady, became entitled to administration on his estate, and at her request, Wright Brady, the complainant, applied for and obtained temporary letters of administration thereon.

Upon obtaining them he filed a bill in chancery, enjoining the execution creditors of his intestate's estate from the collection of their debts, which bill is brought up in the record before us. The bill was demurred to, and the presiding Judge in the Court below overruled the demurrer, and an exception to his judgment on the demurrer makes this case.

Much of the property in the hands of the temporary administrator, and which was in the possession of his intestate at the time of his death, proceeded from the estate of William

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Dennard, and passed by his will to his son, Burton T. Dennard, who subsequently died, and on whose estate complainant's intestate administered. It was further complicated by an alleged claim of Mrs. Julia A. Brady, under a compromise between herself and her husband, and Burton T. Dennard, her brother, and Mrs. Irene Dennard, by which she insists she became entitled, as her separate property, to an interest of one-third in her deceased father's estate, and into the enjoyment of which her husband, in his life time, had been placed, by her deceased brother allowing him to occupy it jointly with himself to that extent.

This was done by her brother after he had attained the age of twenty-one years, in execution of an obligation into which he had entered during his minority, to convey to the said William M. Brady, the deceased husband of the said Julia A., in trust for the said Julia A., an amount equal to one-third of the whole estate of which the said William Dennard died seized and possessed, and the increase up to the time of the division, as soon as he shall have attained to the age of twenty-one years. The conveyance had not been executed, nor the property set apart, under said contract of compromise, but it was affirmed in the manner above stated, after Burton T. Dennard arrived at majority.

At the time of the death of the said William M. Brady, there was pending in the Superior Court of Dougherty county, an action against Mrs. Irene Dennard, William M. Brady, as administrator of Burton T. Dennard, and the said William M. Brady and his wife, Julia A. Brady, in favor of Jerry Cowles, for the use of Franklin Bivins, for the sum of five thousand dollars, on a warranty deed made by William Dennard in his life time.

The defendants, judgment creditors of the said William M., demurred to the bill on several grounds:

- 1st. That there is no equity in the bill.
- 2d. That the complainant has no equity.

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3d. If there be any equity, it is in favor of Julia A. Brady, who ought to have filed the bill, or ought to have been made a party complainant.

4th. Because, according to the case made by the bill, no trust was created for Mrs. Brady, nor was the property vested to her separate use; and consequently, the marital rights of the husband attached thereto.

Such was the demurrer which was overruled in the Court below.

The statement of the case by the Reporter, and the additional facts apparent on the face of the bill, as hereinbefore stated, are all that is necessary to a decision of this demurrer.

The property in the hands of the complainant, which proceeded from the estate of William Dennard, is subject, first, to the payment of any judgment which may be recovered in the suit in favor of Jerry Cowles, for the use of Franklin Bivins, on the warranty contained in the deed made by him. It passed to his legatees subject to his debts and contracts. It is, therefore, right that a sufficient amount of property which came from his estate, should be retained by order or decree of the Court, until permanent letters of administration are had upon the estate, to extinguish whatever judgment may be obtained. After the satisfaction of that judgment, if a judgment should be attained, Mrs. Brady has the highest claim under the agreement of compromise. That agreement was never executed by a division of the property and a conveyance in trust for Mrs. Brady, and she has a right to demand its execution before the property can be appropriated to the payment of the debts of her deceased brother. By the agreement of compromise she is entitled to it as coming from her father's estate, as it was one condition that she should have an amount equal to one-third of her deceased father's estate, if she and her deceased husband would abandon their proceedings against the will; which was done.

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It will be remembered that William M. Brady was, at the time of his death, administrator on the estate of Burton T. Dennard, and his wife was his only heir at law. He had not completed the administration by the payment of the debts of his intestate. There were, at that time and still are, judgments of large amount against the estate of Burton T. Dennard. He held the property, therefore, as administrator, and not in right of his wife as next of kin of her deceased brother.

The husband must reduce the wife's property or choses in action to possession as husband, in order to defeat the wife's title by survivorship. *Baker vs. Hall*, 12 *Vesey Jr.*, 497; *Wall vs. Tomlinson*, 16 *Vesey Jr.*, 416.

If the estate of William M. Brady was chargeable, at the time of his death, to the estate of Burton T. Dennard, of which he had been administrator, the amount for which it was chargeable constituted a demand of higher dignity, in a course of administration, than any other debt of said intestate. *Cobb*, 288.

[1.] The administrator ought to have presented all these matters to the Court, that the property found by complainant to have been in possession of his intestate, at the time of his death, should remain unmolested in his hands, until a general and full administration can be granted, when all conflicting claims to property can be investigated, and the rights of parties can be authoritatively adjusted.

[2.] It is necessary that Mrs. Brady should be a party complainant when she seeks relief at the hands of the Court, in respect to the matters of which she has given the temporary administrator notice. She is not moving here, and if, upon a grant of permanent letters of administration, the administrator should refuse to recognize her rights and respond to her demand, she may then call him to account. But it may be well to remark, that it is possible that her rights might be fully adjudicated under a bill filed by a rightful administrator, especially if the validity of her claims were questioned by creditors who, with herself, in such cases, might be called

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upon to litigate their rights. That case is not before us, and probably never will be, as between parties interested in these several estates.

Judgment affirmed.

HENRY A. and GEORGE W. CASTOR, plaintiffs in error, vs. DAVIS PACE, defendant in error.

On the death, pending a suit, of one of two joint administrators sued for a devastavit, a suggestion of the death may be made of record, and the action may proceed against the survivor.

Debt, from Dougherty county. Decision by Judge ALLEN, at December Term, 1857.

This was an action of debt by Henry A. and George W. Castor, against Davis Pace and John F. Spicer, administrators of John S. Wilkerson, deceased, suggesting a devastavit.

The case being called for trial on the appeal, plaintiffs suggested on the record the death of Spicer, and moved to proceed against Pace, the surviving defendant and administrator.

The Court refused the motion, and ordered the proceedings in the case to be stayed until the representatives of Spicer were made parties defendants. To which decision plaintiffs counsel excepted.

VASON & DAVIS, for plaintiffs in error.

LYON & IRWIN, for defendant in error.

By the Court—McDONALD, J. delivering the opinion.

This was an action suggesting a devastavit on a judgment

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obtained by the plaintiffs, against John F. Spicer and Davis Pace, as administrators on the estate of John S. Wilkerson. During the pendency of this suit John F. Spicer died, and when the cause was called for trial, the plaintiffs moved to suggest his death on the record, and to be permitted to proceed to trial against the survivor, Davis Pace. The Court below refused the motion, and the decision is excepted to.

If the cause of action survives against the defendant, Pace, the decision is erroneous; otherwise, it is right. "Executors or administrators of executors or administrators were not, at common law, liable for the *devastavits* of those they represented, because they could not be supposed to know how their testators or intestates had disposed of the goods; and therefore, this was esteemed *actio personalis quæ moritur cum persona*. *Bar. Al. Ex. and Ad.*, p. 3. By the statute of 4 and 5 *Will. and Mary*, it is enacted that all and every the executor and executors, administrator or administrators of such executor or administrator of right, who shall waste or convert to his own use goods, chattels or estate of his testator or intestate, shall from thenceforth be liable and chargeable in the same manner as his or their testator or intestate should or might have been. *Schley's Digest*, 287.

An action for a devastavit does not now die with the person, and therefore, may be revived against the executor or administrator of a deceased executor or administrator. But because it may be revived against the executor or administrator of Spicer, the deceased co-administrator with Pace, does the suit abate as to Pace, or must its progress be arrested until the representatives of Spicer can be made a party? We think not. Each administrator is liable for his own devastavit. If the devastavit is joint, and both are equally culpable, each one is liable for the whole; and under special circumstances, an administrator may be liable for the devastavit of his co-administrator. Before the enactment of these statutes and the one which I now proceed to refer to,

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the action no doubt abated, but by the Act of 8 and 9 William III, if there be two or more plaintiffs or defendants, and one or more of them should die, if the cause of action should survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated ; but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs, against the surviving defendant or defendants. It was insisted in the argument, however, that according to the literal interpretation of this Act, to authorize the suit to proceed against a surviving defendant or defendants, one of the plaintiffs must have died that it might continue in the name of the surviving plaintiff or plaintiffs. That is rather too literal a view of it, and is not the meaning of the statute.

We think the action survived against Pace, and that the Court ought to have allowed the motion of plaintiff's counsel, to suggest the death of Spicer of record, and to proceed to trial.

Judgment reversed.

JOHN H. SNIDER and wife, plaintiffs in error, vs. WILLIAM NEWSOM, ex'or, defendant in error.

A man's will was to this effect: I give "all my estate" to my wife; "but in case" she marry again, I give it to my five children. She married again. *Held*, That she lost the estate, and it went to the children.

In Equity, from Lee. Decision on demurrer by Judge ALLEN, January adjourned Term, 1858.

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On the 31st January, 1855, Cæsar A. Savage, of the county of Lee, duly made and executed his last will and testament and shortly thereafter departed this life. The following is a copy of said will, left in full force and unrevoked by deceased at his death:

GEORGIA, LEE COUNTY:

In the name of God, amen. I, Cæsar A. Savage, being weak in body but of sound mind, memory and understanding, and considering the certainty of death, and the uncertainty of the time thereof, and to this end, that I may be the better prepared to leave this world whenever it shall please God to call me home, do therefore make and declare this my last will and testament, hereby revoking and making void all former wills by me at any time heretofore made.

Item 1st. I hereby constitute and appoint my beloved wife, Francis M. T. Savage, and my friends, John T. Simms and William Newsom, and the survivor and survivors of them, executors and executrix of this my last will and testament. After the payment of my just debts and charges I dispose of my estate as follows:

Item 2d. I give, devise and bequeath all my estate, both real and personal, save what shall be necessary for the payment of my just debts and charges, to my beloved wife, Frances M. T. Savage, (subject to the conditions herein named,) with the power to sell, convey, give or dispose of, by deed, will, or any way she deems proper. But in case my said wife, Frances M. T. Savage, shall marry again after my decease, then, and in such case, I revoke the foregoing bequest to her and direct that the same shall from thenceforth cease and determine, and the whole of my estate, both real and personal, hereinbefore given to her, I give, devise and bequeath to my five children, Darnette Savage, Charles Savage, Henry Savage, John Carter Savage and Eliza Johnson Savage, to be divided equally between them, share and share alike; my wife to account for the whole of my estate, that may, up to

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that time, have gone into her hands, except such as she may have expended for the support, maintenance and education of herself and the said children, my intention being to exclude her entirely from any participation whatever in my estate, in case she should ever marry again after my death. And in case she does not, then that she have the whole, to give to my children, at such time and in such quantities, or none at all, as she pleases; my being in this particular to make my children dependant for any part or share of my estate solely upon their mother and my said wife, in case she remains a widow.

Item 3d. I prefer that all my estate shall be kept together, as I leave it, without any sale, if it is possible, my executor paying my debts and all expenses out of the income arising from my estate, but this I leave entirely to the discretion and judgment of my wife, Frances M. T. Savage. I not caring to clog my intention in her favor with other conditions and restrictions than that she remain single.

In witness whereof I, Cæsar A. Savage, have to this my last will and testament, set my hand and seal this, the thirty-first day of January, eighteen hundred and fifty-five (1855.)

CÆSAR A. SAVAGE. [SEAL]

This will was admitted to probate in the Court of Ordinary, and the widow of deceased and William Newsom duly qualified as executors.

Sometime afterwards, the widow, the said Frances M. T. Savage, intermarried with John H. Snider, and immediately thereupon Newsom took possession of the estate of his testator and assumed the sole and exclusive control and management thereof.

Snider and wife filed their bill, claiming and setting up an absolute title to the whole estate, and alleging that the condition contained in said will being in restraint of marriage was illegal and void.

Defendant, Newsom, demurred to the bill.

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The Court, upon argument, sustained the demurrer and dismissed the bill, and complainants excepted.

H. MORGAN, for plaintiffs in error.

LYON, IRWIN & BUTLER, *contra*.

By the Court.—BENNING, J. delivering the opinion.

There was a gift, over, "in case" the widow should "marry again." This gift, over, if in itself, good, put it beyond a doubt, that the widow by marrying lost her legacy.

"It is agreed on all hands that, (however restrictive of marriage," the condition,) "when the legacy is given over to other uses, the testator shall be deemed to regard those uses."

Lord Thurlow in Scott vs. Tyler, 2 Brown Ch. R. 488.

"Yet, though strict words of condition be used in the creation of the estate, if on breach of the condition the estate be limited over to a third person, and does not immediately revert to the grantor or his representatives, (as if an estate be granted by A. to B., on condition that within two years B intermarry with C. and on failure thereof then to D. and his heirs,) this, the law construes to be a limitation, and not a condition." 2 *Black. Com.* 155.

Lloyd vs. Branton, 3 Meriv. 108; Scott vs. Tyler, 2 Bro. C. C. 343; Pyle vs. Price, 6 Ves. 780; Lucas vs. Evans, 3 Atk. 260; Hervey vs. Aston, Willes 83, are cases in which the gift was to one, and if he married without the consent of some third person, over. *Fitchett vs. Adams, 2 Str. 1128; Sheffield vs. Lord Orracy, 3 Atk. 282*, were cases in which the gift was to a person, and if she, (a widow,) married again, in general terms, over. And in all these cases, the decision was, that the donee by marrying lost the gift, and it went over. There are other cases to the same effect. See *Cruise's Dig. Tit. XIII, Sec. 53 et seq., Stor. Eq. Jur. Sec. 280, et seq., Lewis on Peop. Sec. 2158*. Indeed, I did not understand the

counsel for the plaintiff to insist, that, if the gift over was in itself good, the widow did not lose her legacy by marrying again. He insisted, that the gift over was void, and therefore, that it amounted to nothing. In this was he right? His first reason for the position was thus stated by him: "Because it is a well established rule of law, that a bequest over to support a limitation, must be an express bequest of the particular legacy, and that a mere gift of the residue, will not sustain the limitation."

But here, the bequest over is an express bequest. The words are; "the whole of my estate, both real and personal, hereinbefore given to her, I give, devise and bequeath to my five children."

His second reason was thus stated by him, "Because there is another well established rule of law, that when a testator gives a thing to a person to whom the law gives it, and in the same manner, it is as if it had not been given; and such a bequest is void."

But here, the gift over is *not* to the persons to whom the law would give the thing; the gift over is to the children, and the law would give a part only of the thing, to the children; it would give a part to the widow.

I must say, too, that I am not myself prepared to admit the general principle, here contended for. I doubt whether such a principle is in force in this State, or, at this day, even in England.

His third and last reason was thus stated by him: "Because the bequest over is an attempt to limit a fee on a fee, which cannot be done."

But a fee may be limited on a fee by an executory devise, if the limitation over is such, that it must take effect, if at all, within a life or lives in being, and twenty-one years afterwards. *Bac. Abr. "Devise" (I.) 2 Black. 173.*

Besides, "A condition *in deed*, may be *annexed to every species of estate*; to an estate in fee, in tail, for life, or years,

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in any lands or tenements." *Cruise's Dig. Tit. XIII, sec. 9, Fitchett vs. Adams, 2 Str. 1128.*

It is not true, then, that the gift over was void. The gift over, being in itself good, it must follow, then, that the widow, by marrying again, lost her legacy.

But even if the devise over was in itself void, it would still be true, we are strongly inclined to think, that the widow, by marrying again, lost her legacy.

There is not an English case, or dictum, I think, countenancing the doctrine, that the rule making conditions in restraint of marriage void, extends to the case in which, the person on whom the condition is imposed, is a widow. There is a broad and strong current of judicial and professional dicta, to the contrary. *Jordan vs. Holkham, Amb. 209; Scott vs. Tyler, 2 Bro. Ch. R. 380; 1 Jarm. Wills, 837; Cruise's Dig. Tit. XIII, sec. 67; 1 Stor. Eq. Jur. sec. 285.*

The estate, *during* widowhood, is as old as the common law. Such an estate is, precisely equivalent in import, to an estate to a widow for her life, *on condition* that she does not marry again. Is it possible that there can be one law for the former estate, and another law for the latter?

Widows in a majority of cases, have children. A second marriage must, almost of necessity, interfere with their duties to these. In practice it, frequently, also endangers the peace and the property of the children.

A part of the Act of distributions of 1804, is in these words: "If the father or mother be alive, and a child dies intestate, and without issue, such father, or mother, in case the father be dead and not otherwise, shall come in on the same footing as a brother or sister would do. *Provided*, That such mother, after having intermarried, shall not be entitled to any part or proportion of the estate of a child who shall die intestate and without issue, but the estate of such child shall go to, and be vested in the next of kin on the side of the father." This indicates a policy in the Legislature, to discourage widows from marrying.

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It is true, that there is a decision, in Massachusetts, which seems to sanction the position, that a condition in restraint of marriage, can no more be imposed on a widow, than it can, on a woman that has never been married. *Parsons and wife vs. Winslow*, 6 Mass. But the decision is, so far as this Court is concerned, but matter of judicial dictum, and as such, it is hardly potent enough, to turn back the broad and strong current of judicial and professional dicta, to which I have referred.

The doctrine that conditions in restraint of marriage are void, is one that came from the civil law, if it came at all, of which I have serious doubt.

By the civil law, even a condition that one should not marry without the consent of some third person, was held void; it being so easy a thing, to select, as this person, one who would never give the consent; yet, by the common law, such a condition is held valid. Is not this enough to show, a general repugnancy in the common law to the civil law.

Then, the common law has its estate during widowhood. The civil law, I suppose, would see no difference between such an estate, and an estate to a widow for her life, provided, she did not marry again, and, therefore, would hold such an estate an absolute estate during life.

And, the common law, it is admitted on all hands, I believe, never removed this doctrine at all, as to *realty*. If it be true, that it was ever received as to *personalty*, the time at which it was so received, must have been long ago, when *realty* was every thing. Rejecting it, as to *realty*, at a point, that has gone but a very little way, from the Roman law, the end would, besides, have been a very absurd self-inconsistency. The owner was absolute, of it as he pleased; but as to *personalty*, it was owner absolute, of it as he pleased; but as to *realty*, it was fettered.

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Now, these things being so, is it likely, that the common law would reject this doctrine as to realty, and yet receive it as to personalty?

I say, then, that I doubt, whether this doctrine was ever, to any extent, received by the common law. I admit, however, that there is high authority, for its having been received by that law, to a very limited extent. But certainly the far greater part has been rejected. And is it not of necessity, that any principle, to be one that would reject this greater part, *would have* to be one that would reject the lesser part? It would rather seem to me, so.

We think, that the Court below was right, in holding that there was no equity in the bill.

Judgment affirmed.

THOMAS D. SPEER, plaintiff in error, vs. ALFRED F. Mc-
PHERSON, defendant in error.

A rule absolute against a Sheriff, is not such a judgment as has a lien on his property, and, as can compete with judgments on verdicts against him, for money raised under those judgments from his property.

Rule against Sheriff, from Sumter. Decision by Judge KIDDOO, on motion to distribute money. September Term, 1857.

At the November Term, 1855, of *the Inferior Court* of Sumter county, the following rule absolute was taken against P. F. Thompson, late Sheriff of said county, viz:

“Sumter Inferior Court, November Term, 1855.

<p>A. F. McPherson, vs. Portlock F. Thompson, late Sheriff</p>	}	<p><i>Rule Absolute.</i></p>
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The late Sheriff, Thompson, having been served with a copy of said rule, and he having failed to show cause why he should not pay the amount claimed thereon, it is ordered that the said Portlock F. do pay to the said A. F. McPherson the sum of two hundred and fifty-seven dollars and sixty-four cents, and in default thereof he be considered in contempt.

I consent to the paying of the above rule absolute. This 28th November, 1855.

[Signed]

P. F. THOMPSON.”

The fund in the Sheriff’s hands, for the payment of which the above rule absolute was taken, consisted of costs which he had before that time collected, due and belonging to McPherson, who was Clerk of said Court.

At May Term, 1857, of the Inferior Court, the following order was passed :

<p>A. F. McPherson, vs. P. F. Thompson, late Sheriff</p>	}	<p><i>Rule Absolute to pay money.</i></p>
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It appearing by the statement of A. S. Cutts, present Sheriff, that he has in hand \$876 63, raised by him on a fi. fa., returnable to this Court, in favor of James S. Odom, against P. F. Thompson, and other fi. fas. against said Thompson. And it further appearing to the Court that there is on the minutes of this Court, of November Term, 1855, a rule absolute in favor of A. F. McPherson vs. P. F. Thompson, for the sum of \$257 64, it is ordered by the Court that the

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Sheriff do pay over said money to the unsatisfied judgments now here claiming the same according to their priority, said rule absolute ranking as a judgment of November Term, 1855.

To the above order Thomas D. Speer, who was a junior mortgage creditor of Thompson, excepted :

1st. Because the rule absolute against Thompson, late Sheriff, is void for irregularity and uncertainty.

2d. Because rules absolute are not such judgments as can take money to the prejudice of a mortgage creditor.

3d. Because the movant in this case has lost, by his laches, all equitable lien on the fund in Court.

The exceptions were overruled by the Inferior Court, and Speer sued out a certiorari.

Upon the hearing and after argument, Judge KIDDOO dismissed the certiorari and affirmed the judgment of the Inferior Court, and counsel for Speer excepted.

BROWN & ELAM, for plaintiff in error.

McCoy & HAWKINS, *contra*.

By the Court.—BENNING, J. delivering the opinion.

Is a rule absolute against a Sheriff, requiring him to pay over money, such a judgment as binds his *property* in the same way in which, judgments on verdicts, bind it? This is the great question.

And we think that it is not.

The full import of such a judgment is, that the Sheriff do pay over the money or that in default thereof he be *committed to jail*, not, that in default thereof, the money be *made out of his property*. How then can it bind his property.

A fi. fa. to execute such a judgment is a thing never heard

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of How is this fact to be accounted for, except by assuming, that such a judgment does not bind property?

Indeed, such a judgment is of the nature of a sentence in a criminal case—a sentence imposing a fine. Such a sentence does not bind the property of the culprit. The Court may remit a fine, during the term at least. Suppose the Court had remitted the requisition contained in this rule, would that be a payment or satisfaction to the plaintiff, in the rule? Surely not. Such a judgment is quite different from the ordinary judgment rendered on a verdict.

It is true, that the Act of 1810, to point out a rule for the priority of judgments, uses the comprehensive words, “all judgments,” saying, that “all judgments obtained in the Superior, Inferior, or Justices Courts,” “shall be entitled to the right or claim of any money received by the Sheriff,” &c. *Pr. Dig.* 435. Still, it cannot be, that the Act can, by virtue of such words as these, include judgments which, by their own import, cut themselves off from the right to claim such money.

Indeed, by the *title*, the Act is one to *regulate* liens; not one to *create* liens; and, by the law previously existing, rules absolute against Sheriffs, were judgments without lien. It is not to be presumed, that the Legislature by the use of general expressions in the body of the Act, intended to make the body different from the title, and thus, intended to violate the Constitution.

We think, then, that the rule absolute against the Sheriff had no lien on his property, and therefore, that it was not entitled to take the money raised out of his property by *fi. fas.* to the exclusion of those *fi. fas.* And, therefore, we think, that the Court erred in not granting the certiorari.

There were some other grounds on which the application for the certiorari was also put. These we think were plainly of no validity.

It was objected in this Court, by McPherson's counsel that the mortgagee, Speer, had not the right to intervene, in the

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case. He was allowed to intervene in the Inferior Court; no objection to his intervening was there made. The objection as made here, was put upon the ground, that the remedy of Speer was by a bill in equity, and not, by a participation in the case made by the money rule. A money rule is, itself, an equitable proceeding; and one, which, in my own opinion, was open to Speer in this case. 9 *Ala.* 679, and cases cited.

At any rate, it is now too late to urge such an objection.

Judgment reversed.

MARY GOODSON, plaintiff in error, vs. JOHN BEACHAM, defendant in error.

[1.] B. had the title to a lot of land. The interest of G. in the lot, was levied on. At the sale, B. gave notice of his title, but was a bidder for the lot, which was knocked off to a third person.

Held, That B. was not estopped from asserting his title to the lot, against the latter.

[2.] A. having no title, sold to B. and conveyed with warranty. Afterwards, A. acquired the title. In a suit by B. for the land against a third person, *held*, that on A's acquiring the title, a perfect equity vested in B. which entitled him to recover the land.

Action to recover land, from Lee. Tried before Judge ALLEN, April, 1857.

This was an action brought under the form prescribed by Act of 1847, by John Beacham, against Mary Goodson and Ananias Newsom, to recover lot of land No. 101, situated in the 16th district of Lee county, and for mesne profits. At the trial, plaintiff dismissed as to Newsom, and proceeded against Mary Goodson alone.

Plaintiff offered in evidence :

1st. A grant of the lot in controversy to Ans. Kimberly, dated 29th May, 1829.

2d. Depositions of William Y. Hansell.

3d. A deed from W. C. Street to Samuel M. Street and Charles A. Pringle, for one-third of the lot, dated 12th May, 1848, recorded 16th June, 1855.

4th. A deed from William Mims to plaintiff, dated 8 April, 1850, recorded 18 Feb., 1851.

5th. A deed from Sam. M. Street and Charles A. Pringle to William Mims, dated 5 Feb., 1851.

6th. *Griffin Smith*, who swore that Thomas Goodson went into possession of the lot in 1847, and cleared some four or five acres, worth two dollars per acre rent. Since the sale by the Sheriff, Mary Goodson claimed it.

7th. *Washington Knight*, who swore that he understood they were in possession ; that old man Goodson cleared the land and lived on adjoining lot, and Mary Goodson live with him ; he only knew the number of the land by hearing, and did not know that Mary Goodson ever was in possession of the land, or received any of the rents and profits.

Evidence for Defendant :

1st. A written notice by Alfred Keney constable, dated 20th Nov., 1850, directed to Thomas Goodson, of a levy made on lot No. 101.

2d. The Sheriff's deed, dated 24 February, 1851, reciting a sale on the first Tuesday in January, 1841, by virtue of a *fi fa* in favor of John J. Hudson, against Thomas Goodson.

3d. The deposition of John Layton.

Plaintiff in reply proved that he was at the Sheriff's sale, and said to persons present, that he had the only paper title to the land, and that whoever bought would buy a law suit. Also, that Willis A. Hawkins, Esq. stated the same thing, that Thomas Goodson's *interest* in the land was levied on and sold.

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In rebuttal by defendant.

That Hawkins attended the sale at the instance of Mims; that only Goodson's interest was sold, and the crowd at the sale was so satisfied; the object was to get a squatter off the land.

The jury under the charge of the Court, found for the plaintiff the land in dispute and forty-eight dollars mesne profits.

Defendant moved for a new trial on the following grounds:

1st. Because the Court erred in refusing to charge the jury as requested by defendant, that if they believed from the evidence that at the time of the sale by the Sheriff, the plaintiff was present and bid for the land under a statement made by W. A. Hawkins, Esq., that the land was sold to confirm title, then the plaintiff could not dispute the title of the purchaser at Sheriff's sale.

2d. Because the Court erred in refusing to charge, that if plaintiff and Mims combined to sell the land to get Goodson, defendant *in fi. fa.*, out of possession, and sold the land and plaintiff bid for it, the purchaser got a good title as against Mims and plaintiff.

3d. Because the Court erred in refusing to charge, that if the deed from Mims to plaintiff was made before he had title himself the plaintiff got no title.

4th. Because the Court erred in charging, that if Mims made a deed to Beacham, having no title, and afterwards got title, this title accrued to the benefit of Beacham's title.

5th. Because the jury found contrary to the evidence and law.

6th. Because the jury found contrary to the charge of the Court, in this, that the Court charged, that if Mary Goodson was in possession under Sheriff's title and paper title adversely, on the date of the deed to Mims, then the deed from Mims to plaintiff was void, and he could not recover.

The Court refused to grant a new trial, and defendant by his counsel excepted.

WARREN & WARREN; and STROZIER, for plaintiffs in error.

LYON & IRWIN; and HAWKINS, *contra*.

By the Court.—BENNING, J. delivering the opinion.

The Court refused to grant the motion for a new trial. Was that right?

The first ground of the motion, is of no validity.

Hawkins's statement was this: "That he instructed the Sheriff to sell only the *interest* of Goodson, and so notified the crowd."

This is a quite different thing, from "a statement that the *land* was sold," &c.

And the evidence is not such, as to make it clear beyond a reasonable doubt, that Hawkins had authority from Beacham, to make even this statement, or, authority to act for Beacham in any way.

Then, the constable proves, that he levied on the "interest" of Goodson in the land; and he, and others prove, that Beacham gave public notice of his title, at the sale.

[1.] Mary Goodson bought, then, with *notice* of Beacham's title. She cannot complain if Beacham asserts his title against her. There is no fraud. What if he did bid at the sale? Did that hurt her?

The request, then, referred to in this ground, was authorized neither by the fact nor the law.

The second ground does not differ materially, from this first ground.

The third and fourth grounds may be considered together.

Mims, when he made the deed to Beacham, had no title; but his deed was an attempt to convey the fee, and it was a deed with a warranty.

This shows, first, that it was the *intention*, that the *land*,

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the *whole* interest in the land, should be conveyed to Beacham ; secondly, that Beacham had paid the purchase money.)

Such being the intention, the consequence would be, that if Mims should afterwards acquire the title, he would be bound to convey it to Beacham, as much so, as if the contract were one standing in the form of a bond for titles.

Perhaps, this would be the consequence, even without the warranty. *Taylor vs. Debar*, 2 Cas. in Ch. 212 ; 1 do. 270 ; *Wright vs. Wright*, 1 Ves. Sen., 409 ; *Noel vs. Bewley*, 3 Sim. 103 ; *Smith vs. Baker*, 1 Young & Call. ch. 223 ; *Jones vs. Kearney*, 1 Drury & Walsh, 159 ; Cited in note 2 *Rawle Cov.* 438 ; *Sug. Ven. ch. 8, sec. 2, p. 33 ; Rawle Cov.* 448.

[2.] But if the case were so, that the contract was in the form of a bond for titles, then, as the purchase money was paid, the contract would give Beacham a *complete equity* in the land, the moment the title came into Mims, and a complete equity according to *Pitts & Bullard*, 3 Kelly, would be equivalent to the legal title, so far as to enable Beacham to recover, or defend, in ejectment.

The contracts being in the form of a warranty, does not make the case materially different.

In this way, then, as the Court said, it is true, that the title, when acquired by Mims, "enured" to the benefit of Beacham ; and *not* true, that, though the deed was made by Mims before he had title himself, "Beacham got no title to the land by his deed."

There is nothing then, in these two grounds, the third and fourth.

We do not think that the verdict was contrary to "the evidence and law."

This Court has decided, that the 32 *Henry VIII* against Bracery and the buying of titles, is not in force. At Macon, June, 1857, *Doe ex dem. Morris vs. Monroe*. So there is nothing in the fifth and sixth grounds.

Judgment affirmed.

CHARLES W. MORGAN, plaintiff in error, vs. FRANCIS M. JONES and wife, defendants in error.

- [1.] Letters of administration on the estate of the deceased wife of a surviving husband, claiming property through her, are inadmissible, until property is proven in the wife.
- [2.] The affidavit of a party to a cause, that an original paper, of which he had the proper custody, was in his possession, that it had disappeared without his consent, and was seen in the possession of the counsel of the opposite party, is sufficient proof to admit secondary evidence.
- [3.] Upon the same the counsel for defendant in error ought to have been compelled to answer on the motion of plaintiff's counsel, if he had the deed in Court, and to produce it if he had.
- [4.] A ground of error not certified by the Court will not be considered.
- [5.] A party must always make the usual preliminary proof for the admission of secondary evidence, or that kind of evidence will not be admitted.
- [6.] A party cannot claim titles to property on account of his marriage, because he had heard that the father of the wife had admitted that the property belonged to her. The statement must have been made to induce the marriage.
- [7.] If there be written evidence of title it should be produced; if lost or destroyed its contents may be proved.

Trover, from Sumter. Tried before Judge KIDDOO, September Term, 1857.

This was an action of trover, brought by Francis M. Jones and wife, Julia A. Jones, (formerly Morgan,) against Charles W. Morgan, the father of Mrs. Jones, for the recovery of the one-fifth of two negro women, Binah and Katey, and their increase.

On the trial, it appeared from the evidence, that plaintiffs were married about 1848, at which time Mrs. Jones was a minor, about nineteen years old; that her mother, Charlotte Morgan, wife of defendant, and formerly Charlotte Gibbons, died in 1841; that Jones, the plaintiff, boarded with defendant at the time he married his daughter, and remained there a few months afterwards; that defendant, after his wife's death, admitted that the negroes belonged to his children; never claimed Katey and her children; always acknowledged

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that they belonged to his children, and was willing to give them up, but did not do so, for the reason that plaintiff said he would have all or none; the value of the negroes and their annual hire was proved; also demand and refusal.

Plaintiff then read in evidence the following deed:

GEORGIA, LAURENS COUNTY:

Know all men by these presents, that I, Ann Gibbons, of this county and State aforesaid, for, and in consideration of the good will and affection that I have towards my daughter, Charlotte, now wife of Charles W. Morgan, of this county, do hereby give and bequeath to her, the said Charlotte Morgan, and to her heirs forever, a certain negro girl, named *Binah*, about sixteen years of age—that is to say, to be and remain hers during the period of her natural life, not subject to the control of her present husband, nor any other person whatsoever, or subject, in anywise, to the said Charlotte Morgan nor her present husband, so far as to be entitled to sell or dispose of the same, or in anywise subject to any contract, dues or demands against the said Charlotte or her husband, Charles W. Morgan, but to be and remain hers during her natural life, and at her death to belong to her children—that is to say, the said *Binah* with all her increase.

In witness whereof I have hereunto set my hand and seal this 22d day of April, 1826.

ANN GIBBONS, [L. S.]

Witness:

MARY SALTENSTALL,

JOSEPH JOINER.

This deed was recorded 24th April, 1826.

Plaintiff closed.

Defendant proved that he married Charlotte Gibbons in 1821, and lived the balance of that year with Mrs. Gibbons

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and managed her business; in 1822 moved off and lived within a mile of Mrs. Gibbons; that from 1822 up to 1831 he was in possession of Binah; defendant removed from Laurens to Sumter county in 1832, and took Binah, and has had possession of her ever since; that he took possession of Katey and her family in 1826, and a deed was then made to them.

Defendant then offered in evidence letters of administration granted to him on the estate of his deceased wife, Charlotte, dated 3d May, 1852.

Plaintiff objected to their introduction on the ground of irrelevancy. The Court sustained the objection and defendant excepted.

Defendant offered a copy deed from the records of Laurens county, duly proved and recorded, certified by the Clerk, from Ann Gibbons to Lewis Snider, senior, and Henry Gibbons, for negro Katey and other negroes and property, in trust for Charlotte W. Morgan, for life, and after her death to her heirs, dated 31st July, 1826, and proposed to prove by his own oath, that he was in possession of the original, which was taken from him or disappeared without his knowledge or consent, before this suit was brought; that he had made diligent search and could not find it, and that it was not in his power, possession, or control.

The Court rejected the copy deed as affording no evidence of the existence of the original, and as its existence could not be shown by defendant's own oath, (defendant proving on his cross-examination, or proposing to prove that the original was in the possession of Willis A. Hawkins, Esq., attorney for plaintiffs, at the time this case was tried before, in 1853, and that it was used in evidence; that he had not applied to Hawkins for the deed, although he believed it was now in his possession), and defendant excepted.

Defendant then offered in evidence a copy of a deed from Ann Gibbons, to Binah, dated 6th January, 1820, to Char-

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lette Gibbons, his late wife, properly certified, from the records of Laurens county, and offered to prove by James Glass that he saw the original in defendant's possession in 1827, and that it then had the appearance of age. Plaintiff objected to the introduction of the paper, and the Court sustained the objection and rejected the copy and Glass' testimony, and defendant excepted.

Defendant closed.

After argument of counsel and the charge of the Court, the jury retired and found for the plaintiffs "three thousand one hundred and forty dollars, it being the one-fifth part of the valuation of the negroes, which amount may be discharged by defendant delivering to plaintiff his share, to-wit: one-fifth of the negroes, if done by the first January next, and also, \$1,276 80 for hire."

Whereupon, defendant moved for a new trial, on the ground of error in all the rulings and decisions above excepted to, and further, because the Court erred:

1st. In charging the jury that if a parent permits property to go home with a son-in-law, unexplained, the law presumes a gift, but *whenever it appears in evidence that there was a deed, then the deed must be produced*, and illustrated the latter part of this charge as follows: "It is alleged that before the deed of 1826, Binah had been in possession of defendant for more than four years. Now, if she had been in defendant's possession in 1822, and up to 1826, without explanation, the gift was absolute, but if it once leaks out that there is a deed, that must be produced or accounted for. Hence, the Court thinks the parol evidence does not amount to a gift; if the jury are satisfied there was a deed made at the time the gift was made, it must be produced or accounted for; it is the highest evidence of the nature of the trust, and parol evidence will not be allowed to prove it to the contrary. If the Court errs there is a higher tribunal."

2d. Because the Court erred in charging the jury "that the statute of limitations cannot avail unless there is an adverse possession, but if the property was held by permission of the owner, by him, as a loan or otherwise, the holder disclaiming title, the possession is not adverse, but if, after holding for some time in that way, he sets up a claim, and the person to be affected had notice of such claim, then, the statute of limitations commences to run;" there being no proof of any hiring, nor any evidence to authorize such charge.

3d. Because the Court erred in charging "that if defendant's admissions that Katey and her family belonged to his children came to Jones' knowledge, he, Jones, had a right to marry Morgan's daughter on those admissions, and Morgan was bound by them," there being no evidence to authorize such charge.

4th. Because the Court erred in refusing to charge as requested by defendant, "that it is not necessary that there should be an actual manual delivery to constitute a valid gift, and if the jury believed from the evidence, that defendant married Miss Gibbons and that Binah was in her possession prior to the marriage, that he lived with his mother-in-law in 1821, and in 1822 lived within a mile or so, that he took Binah with him when he moved off, and she has been in his possession ever since, or for four years, then they are authorized to presume a gift, and they will find, as to Binah and her family, for defendant," the Court saying it is all correct unless it appears that there was a deed at the time of the gift, but if there was a deed, that must control, and not parol evidence.

And because the verdict was contrary to law and evidence and the equity of the case.

The Court overruled the motion for a new trial, and defendant, by his counsel, excepts.

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SCARBOROUGH, WARREN & WARREN, and STUBBS & HILL,
for plaintiff in error.

McCoy & HAWKINS, for defendants in error.

By the Court—McDONALD, J. delivering the opinion.

[1.] The first error complained of in the record is the rejection of the letters of administration granted to the plaintiff in error, on the estate of his deceased wife. They were offered in support of his title to the property sued for. Up to the time of his tendering them in evidence, he had established nothing more than a life estate in his wife, and that having terminated at her death, the letters were not evidence, and were properly rejected by the Court.

[2.] We think that the proof proposed to be made by the plaintiff in error was sufficient to lay a foundation for the admission of secondary evidence of the deed for negro Katey, and other negroes and property, in trust, &c., and that the copy deed from the records in Laurens county ought to have been admitted. The original had been in the possession of the plaintiff in error, and had been taken, surreptitiously, from him, and had been seen in possession of the counsel of the opposite party, and was offered in evidence on a former trial. The Court refused to admit the copy, on the ground that the party could not be permitted to prove, by his own oath, under such circumstances, the existence of the original. We think he committed error in thus ruling. The party's affidavit was sufficient. But the record of the paper was some evidence of its existence. The Act of 1819, authorized the recording. *Edginton vs. Nixon*, 5 Bing. N. C. 316; *Bousfield vs. Godfrey*, 15 E. C. L. Rep. 485. But this was a case in which the party might have been ruled to produce the original, and for the Court to have passed a formal order to read a copy in evidence. The affidavit of the party would

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have been sufficient evidence upon which to proceed summarily against the opposite party, to produce the deed in Court.

[3.] The counsel for plaintiff in error moved the Court to compel the counsel of the defendant in error to answer, under the foregoing circumstances, if he had the original deed of gift in his possession, and to produce it, if in Court. The Court refused the motion. In this, we think the Court below erred. The counsel ought to have been compelled to answer if he had in Court the said deed, and if the facts upon which it was alleged the possession had been acquired, were not controverted, an order to produce it ought to have been granted.

[4.] The fourth ground is not certified to by the Court, and cannot therefore be considered.

[5.] The plaintiff did not make the proof preliminary to the admission of the copy deed of gift offered in evidence, that the original was not in his possession, power, or custody, nor was notice given.

The copy, on these grounds, was properly rejected.

The first charge given by the Court was unobjectionable, with the exception of the supererogatory and unnecessary remark, that "if the Court errs there is a higher tribunal." This is certainly not the law *of the case*, and might induce the jury to be less particular in scrutinizing the facts and making a careful application of the principles of law, as given by the Court.

Complained of was rather more favorable than the defendants, and there is nothing in the merits of the case.

Once in the record, that the admissions that Katy and her family belonged to the knowledge of Jones, before his death, and on that ground the charge had been such evidence, and there

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had been further proof that Jones had heard such admissions, and on the strength of them, he had married the daughter of the plaintiff in error, the charge that the plaintiff in error was bound by them was still erroneous. If a man marries a lady under such circumstances, when the statements are not made to induce him to contract marriage, it is his own folly.

A parent is not bound by every idle rumor which may be circulated in the community, in regard to the property of his children, nor by his own casual remarks without meaning or object. To bind him they must be made as a matter of contract, or in a manner, and with an intention, to induce the person to act on them.

[7.] The Court charged the jury, on the request of the plaintiff in error, to which the *defendant in error*, it is alleged, makes exception, substantially correct. The request, itself, was not strictly in accordance with the law, as it has been administered in such cases. To make a parol gift there must be a delivery, and from the request, it is to be presumed that Binah did not accompany Morgan and his wife when they moved to themselves, but that she went to them afterwards. The record is silent as to the precise time that she went to them, nor does it state in what capacity she went, whether as a gift or a loan. There is no evidence that he claimed her, either for himself or his wife, prior to the execution of the deed of gift in April, 1826. He offered in evidence the copy of an instrument purporting to be a deed of gift, bearing date in 1820, but that was rejected, and he offered no further proof as to its contents. It was manifest to the Court that the plaintiff in error claimed that there was a deed of gift executed to his wife, and the Court properly held that that instrument should be produced. If it cannot be produced, the party, if he can, should make proof of its contents, as the best evidence of the nature of the title which passed to Mrs. Morgan.

The remark of the Court to the jury, "that if a party, by

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misfortune or accident, fails to get or produce all the evidence that might have been produced, it is not the fault of the Court or jury," is made a ground of error. The remark involves no legal principle, nor was it calculated to enlighten the jury in regard to any matter of law or fact in issue before them. It was simply useless and improper, as tending to no beneficial end, and had as well been omitted. It cannot, however be made a ground for reversing the judgment of the Court.

It is alleged as error also, that the Court did not allow the defendant to continue the cause. It does not appear in the record that he applied for a continuance.

The evidence in the record is not sufficient to enable us to pass upon the verdict. The plaintiffs in the Court below claim in their declaration, one-fifth of the negroes sued for, and one-fifth of the hire, and the jury find for them one-fifth of both negroes and hire, but there is nothing in the record to show that there was any evidence before the jury on that point. It is not shown how many children Mrs. Morgan left at the time of her death. The first witness sworn for the plaintiffs was her son, and Mrs. Jones, one of the plaintiffs, was her daughter. Beyond this, nothing appears in the record on that point.

We reverse the judgment on the grounds mentioned in this opinion.

Judgment reversed.

Bailey vs. Wood & Co.

THOMAS J. BAILEY, claimant, plaintiff in error, vs. E. F. Wood & Co., plaintiffs in *fi. fa.*, and defendants in error.

The sayings of one who is not a party to the case, or in privity with a party, are not admissible as evidence against either party.

Claim, from Baker Superior Court. Tried before Judge ALLEN, at November Term, 1857.

E. F. Wood & Co. recovered judgment and issued an execution against Absalom Johnson and Thomas S. Hampton, partners under the name of Johnson & Hampton, which was levied by the Sheriff, upon 350 bushels of corn, as the property of Thomas S. Hampton.

Thomas J. Bailey interposed a claim to the corn.

Upon the trial, the Sheriff was the only witness sworn, who was called by the plaintiffs in *fi. fa.* He testified that he made the levy; found the corn on the plantation where James D. Hampton lived, in two rail pens. Thomas S. Hampton also lived on the place; there was about 350 bushels of corn. When the levy was made, Thomas S. Hampton was not present; had never seen him at work on the plantation; when he went to make the levy, he told James D. Hampton the object of his visit, who pointed out the corn to him. Thomas S. lived in one end of the house and James D. Hampton in the other; the corn was worth about 75 cents per bushel.

Claimant objected to the witness stating what he and James D. Hampton said and did at the time of the levy, and in the absence of claimant and defendant. The Court overruled the objection and admitted the evidence, and claimant excepted.

The plaintiff having closed, the claimant moved to dismiss the levy, on the ground that plaintiffs had not proved that the corn was subject to their *fi. fa.*, nor that said Thomas S. Hampton had ever been in possession thereof, or had any property or title thereto.

The Court refused the motion, and claimant excepted.

Claimant then requested the Court to charge the jury, that the burden of proof was on the plaintiffs in *fi. fa.*, and that claimant was not called upon to prove his title until plaintiffs had first proved that defendant in *fi. fa.* had been in possession or had title, and if neither had been proved, plaintiffs were not entitled to a verdict. The Judge replied that he so charged, but if plaintiffs in *fi. fa.* had proven title in the defendant, Thomas S.; this title must be overcome by superior title in the claimant. To which charge claimant excepted.

Just as the jury were retiring to their room, counsel for plaintiffs in *fi. fa.* asked the Court to charge them, that plaintiffs would be entitled to damages not less than 10 per cent, if they believed that the claim was interposed for delay only. Which charge the Court gave, and claimant excepted.

The jury found for the plaintiffs in *fi. fa.*, and claimant moved for a new trial on the grounds,

1st. Because the verdict was contrary to law.

2d. Because the verdict was contrary to the evidence.

3d. Because the Court erred in allowing the Sheriff to prove that James D. Hampton pointed out the corn.

The Court overruled the motion for a new trial, and claimant excepted and assigned for error, all the rulings and charges excepted to on the trial.

J. E. BOWER, for plaintiff in error.

W. E. SMITH, for defendants in error.

By the Court.—BENNING, J. delivering the opinion.

James D. Hampton was a stranger to the case; he was not in privity with either party to it.

Neither party was present, when the conversation took place between him and the witness.

We know not of any rule of law, which would make such a conversation evidence against the claimant, and, therefore

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we think that the Court erred in admitting the conversation as evidence.

This disposes of all the exceptions, for the point here decided, is the point, and the only point, involved in all of them.

Judgment reversed..

BENJAMIN O. KEATON, plaintiff in error, vs. **ARCHIBALD McDONALD**, defendant in error.

A Justice of the Inferior Court has not the right to issue a distress warrant for rent, under the Act of 1811.

Distress warrant, from Dougherty county. Decided by Judge ALLEN, December Term, 1857.

A distress warrant was issued by Jackson, a Justice of the Inferior Court of Dougherty county, in favor of Benjamin O. Keaton against Archibald McDonald, for rent. This warrant the Sheriff executed by levying, in part, on a lot of land.

On the 12th of April, 1856, McDonald moved the Superior Court that the distress warrant might be dismissed, on the following grounds :

1st. Because the same was issued by a Justice of the Inferior Court who, by law, was not authorized to do so.

2d. That the same was levied upon land.

This motion was sustained by the Court on the first ground, and also on the second ground, so far as the land was concerned.

To this decision of the Superior Court Keaton excepted.

HINES & HOBBS, for plaintiff in error.

VASON & DAVIS, *contra*.

By the Court.—BENNING, J. delivering the opinion.

The right to issue such a warrant as this depends solely upon the Act of 1811, “to regulate the collection of rent.” Before that Act, no Judge, or Justice of the Peace, or Court, had the right. The right, then, that exists, is just such as the Act creates,—neither more nor less. The Act says, that the warrant is to be obtained from “any Justice of the Peace within the district where” the tenant resides; and it does not say, that the warrant is to be obtained from any one else. It must follow, then, that the Act does not confer the right upon any Justice of the Inferior Court. *Cobb Dig.* 900; 15 *Ga.* 113.

The remedy provided by the Act is a summary one. 7 *Ga. R.* 52.

Even when thus restricted, the remedy is a very extensive one,—so extensive that it will hardly be possible for a case to arise that will not be within it.

We think, therefore, that the Court below did right in dismissing the warrant upon the first ground of the motion.

It is unnecessary to express an opinion on the second ground.

Judgment affirmed.

GREEN B. MAYO, plaintiff in error, vs. ALFRED KERSEY, defendant in error.

The plaintiff has, in a proper case, the right to enter up judgment, *nunc pro tunc*, against the surety on the appeal.

Motion to enter judgment, *nunc pro tunc*, against security on appeal, from Lee. Decision by Judge ALLEN, January Term, 1858.

Mayo vs. Kersey.

Mayo brought suit against John A. Dennard, on two promissory notes amounting in the whole to \$833 33, besides interest. The writ was returnable to June Term, 1855, and at the February Term, 1856, upon the trial at common law, there was a verdict in favor of the plaintiff, for \$833 33, besides interest and cost; upon which, judgment was signed Feb. 13th, 1856. The defendant being dissatisfied with the verdict, entered an appeal, with Alfred Kersey as his surety. At March Term, 1857, defendant pleaded a payment of four hundred dollars, and all interest up to 3d Oct., 1856, and confessed judgment for four hundred dollars, with interest from 3d Oct., 1856; and upon this confession, judgment was signed at the same Term of the Court against Dennard only.

At the January Term, 1858, plaintiff moved to amend the judgment, and enter up the same *nunc pro tunc*, against Kersey, the surety on the appeal, as well as the principal.

The Court overruled the motion, and plaintiff by his counsel excepted.

PEARMAN & KIMBROUGH; and VASON & DAVIS, for plaintiff in error.

McCoy & Hawkins, *contra*.

By the Court.—BENNING, J. delivering the opinion.

By the Act of 1826, the plaintiff has the right to enter up judgment against the surety on appeal, as though the surety were a party defendant. *Cobb Dig.* 498.

But against a party defendant, the plaintiff has the right, in a proper case, to enter up judgment *nunc pro tunc*. 18 Ga. 287; 1 Kelly, 560; *Id.* 595.

He must, therefore, have the right, in a proper case, to enter up a similar judgment, against the surety on the appeal.

There can be no doubt, that this is a proper case.

We think, then, that the Court erred, in not allowing the plaintiff to enter up a judgment, *nunc pro tunc*, against Kersey.

The question, here, is merely one of remedy. The right is not denied, and, we think, that the remedy by motion is as good in every respect, as that by *scire facias*, or that by debt.

Judgment reversed.

HENRY S. WIMBERLY, plaintiff in error, vs. NEEDHAM W. COLLIER, defendant in error.

Writs of error founded on a judgment *granting* a continuance, will, in future, be dismissed; as, in such cases, any judgment of reversal must, of necessity, be futile.

Covenant, from Dougherty Superior Court. Decision, on motion to continue, by Judge ALLEN, at December Term, 1857.

This case having been called for trial, plaintiff announced ready. Whereupon, defendant moved for a continuance on the following grounds, to-wit:

That he had been unable, until within some four or five months, to learn the given name of Nathan Johnston, and his place of residence; that Johnston was the lessor of the lot of land which defendant had sold, and concerning which this suit was brought; that he wanted to know whether said Johnston had married Mrs. Eliza McKay, the drawer of said lot; that his family and himself had been sick, and he had been unable to go and get the testimony of the witness; that he expected to show by Johnston, that he married the drawer of said lot of land; that he had sent no one to Carolina, where Johnston lived, to procure the desired information; that he had learned from one Capt. Roberts, that there were

two Nathan Johnstons living in Beaufort district, South Carolina, and both were highly respectable men.

Upon this showing, the Court granted the motion for continuance, and plaintiff excepted.

H. MORGAN, for plaintiff in error.

WARREN & WARREN, for defendants in error.

By the Court.—BENNING, J. delivering the opinion.

The objection made to the showing for a continuance, is, that it exhibits a want of diligence in the applicant for the continuance.

Showings for continuances are matters within the discretion of the Court. Perhaps, in this case, this Court if it had sat in the place of the Court below, would not have granted the continuance; and still it might not be prepared to say, that the Court below abused its discretion.

But to what end was this writ of error brought? Not to correct the error, if any, of the Court below. That is past correction. The continuance was *granted*, and the judgment granting it must execute itself, in spite of any thing that this Court can do.

The question arises, then, is a case of this sort, a case for this Court at all. We think not. The Constitution says, that this Court "shall be a Court alone for the trial and correction of errors." The Act organizing the Court, says of it: "there shall be, and it is hereby established, a Court for the correction of errors." 1 *Kelly*, V.

Now, what are cases appropriate to a Court for the correction of errors? Cases, the errors in which, the Court can correct; not cases, the errors in which, the Court cannot correct—not cases, in which, the Court's judgment must be merely futile.

We think, then, this, not a case for this Court. And, in future, such cases will be dismissed.

Cases in which, the continuance has been *refused*, stand upon a different footing.

Case dismissed.

HIRAM L. FRENCH, plaintiff in error, vs. LUTHER ROLL, defendant in error.

When there is conflicting evidence before a jury, it is their duty to weigh it, and if, in doing so, they render a just verdict according to the proper construction and weight of the evidence, a new trial ought not to be granted.

Complaint on appeal, from Sumter. Tried before Judge KIDDÖ, September Term, 1857. Verdict for plaintiff, and motion for new trial.

This was an action brought by Roll against French, on two notes, one for \$900 80, and one for \$32 82.

The defendant pleaded, first, the general issue; second, payment or set-off to the amount of seven hundred dollars—the value of a carriage and buggy received by plaintiff, and which he promised to credit on defendant's note, but which he failed to do.

Plaintiff offered and read to the jury the notes, and closed.

Defendant (by agreement,) read the affidavit of Geo. R. Wilson, to the effect, that in the fall of 1852, in the city of Augusta, he heard a conversation between plaintiff and defendant, in relation to a debt of about a thousand dollars, due on a note or notes from defendant to plaintiff. Defend-

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ant claimed a credit of \$700, for a carriage and buggy which defendant let him have; plaintiff agreed to take the two vehicles and credit defendant with seven hundred dollars; defendant did not reside in Augusta at the time; had previously removed from that place, and was then on a visit there; heard French say that Roll had notified him by letter after he sold the buggy.

Plaintiff read in reply, the answers to interrogatories of Samuel C. Mustin, to the effect, that he knew of a carriage and buggy left by French at Roll's shop in Augusta, as collateral security for a note on defendant, payable to Roll, for \$900 80. In the summer of 1852, defendant came to Mr. Roll's shop; the coach and buggy were still there; defendant told plaintiff to sell the coach for \$500 and the buggy for \$200, and place the amount, when sold, as a credit on his note, but warned him at the time that if he sold them at less prices than that named, he would hold him responsible for the difference; they were second-hand, repainted, and at the time, the carriage was worth not more than \$300, and the buggy from \$175 to \$200. The buggy was sent by railroad to Newnan and there sold for \$200; expenses of transportation, &c., \$29 50, leaving a balance of \$170 50 net. That there is due to plaintiff for storage on buggy and coach, \$102 00, which deducted from the \$170 50, leaving the sum of \$68 50 to be credited on the note. The carriage is still on hand, never sold, Roll never having been able to sell it at the price fixed on it by defendant, \$350 being the highest offer ever had on it, and that is \$50 more than it would now sell for. Witness is Mr. Roll's book-keeper and salesman, and fully acquainted with all his business, and never heard anything about a purchase of the coach and buggy by Roll.

James Hurlburt answers, that the carriage and buggy were in witness' shop sometime, and they were afterwards removed to Roll's shop; carriage worth from 300 to 400 dollars; buggy worth about 175 or 200 dollars, but in the Au-

gusta market about \$150. Does not know where they are now, or what has become of them.

R. V. Goetchius answers, that in the summer of 1852, French came to Roll's carriage shop; witness was there assisting as salesman and foreman; the carriage and buggy were there at the time; I learned from Mr. French that they had been left there as collateral security for a debt due by him to Roll; defendant limited the carriage at \$500, and the buggy at \$200, which were prices so far above their value in Augusta, as to preclude their being sold, and I so informed him at the time; the carriage was a second-handed one, which had been repaired and done up; would not bring more than \$350, and at present \$300; the buggy would have brought \$175; they are both without harness; witness exerted himself to sell them, but could not. Having quit Roll's employment in 1853, witness cannot say what has become of the carriage and buggy; he left them there; found them there when he first went there; has heard both Roll and French say that they were there as collateral security.

The jury found for plaintiff \$826 37, with interest from 1 June, 1853.

Defendant moved for a new trial on the grounds that the verdict was contrary to law, the evidence, and charge of the Court.

The Court overruled the motion, and defendant excepted.

DUDLEY; and MCCOY & HAWKINS, for plaintiff in evidence.

GEO. W. FISH, *contra*.

By the Court.—McDONALD J., delivering the opinion.

A new trial was moved for in this case on three grounds.

1st. That the jury found contrary to evidence.

2d. The jury found contrary to law.

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3d. The jury found contrary to the charge of the Court.

The Court overruled the motion, and that judgment of the presiding Judge in the Court below is excepted to and makes this case.

There is evidence on both sides of this case, and the jury had a right to weigh it and render a verdict according to their own conclusion, upon a full consideration of it. The notes were read in evidence. The witness Wilson testified that he heard a conversation in the fall of 1852, between the plaintiff and defendant, in which the defendant claimed a credit of seven hundred dollars, on a note of about \$1,000, for a carriage and buggy, which defendant had of plaintiff. The plaintiff agreed to take the two vehicles and give the credit. He heard the defendant say that the plaintiff had notified him when he sold the buggy.

Samuel C. Mustin testified that the carriage and buggy were left with the plaintiff as collateral security for the payment of the notes; that defendant had called at plaintiff's shop and directed him to sell the carriage at \$500 and the buggy at \$200, and told him if he sold them for less he would hold him responsible. He directed him to put the amount, when received, as a credit on the note. This was in January, 1852. The buggy was sent to Newnan on the 15th June, 1853, and sold. The carriage is still on hand as the property of French. The buggy was sold for the gross sum of \$200.

Ryner V. Goetchius confirms the testimony of Mustin, that the carriage and buggy were left as collateral security, and this he heard from the defendant in different conversations.

The jury, in making up their verdict, deducted the full amount for which the buggy was sold.

They had a right to weigh the evidence, and we think that they rendered a just verdict, according to the proper construction and weight of the evidence, and we will not disturb it.

The verdict violated no principle of law.

The bill of exceptions, which is equivalent to none at all, sets forth no charge of the Court, nor does any charge appear in the record.

Judgment affirmed.

EDWARD B. HOOK, plaintiff in error, vs. JAMES C. BROOKS, defendant in error.

[1.] Motions to amend a bill and to dissolve an injunction are much in the discretion of the Court, and unless that discretion is used against the law and justice of the case, this Court will not interfere with its exercise.

[2.] It is not error for the Court to allow an amendment to be made to a bill adding persons as parties defendant, who are *proper* parties, although they may not be *necessary* parties,

[3.] If from the bill and answer, there is a *prima facie* equity in favor of the complainant, it is not error in the Court to postpone an argument to dissolve an injunction, after additional parties are added, until the answers of the new parties are in, and more especially, if from the circumstances disclosed in the bill and answer, it is a proper case for a hearing before a special jury.

In Equity, from Dougherty County, decided by Judge ALLEN, December Term, 1857.

This was an application on the part of E. B. Hook to dissolve an injunction which had been granted, restraining further proceedings in an action of ejectment upon the answers being filed disposing of all the equity in the bill. There was also a motion to dismiss the bill for want of equity. The complainant's counsel showed for cause against the dissolution of the injunction that he had a substantial amendment to make to the said bill, which he then and there proposed to make.

Defendant's counsel objected to such amendment's being made, and urged that the application for the dissolution of

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the injunction should be proceeded with. This objection the Court overruled and allowed the amendment, and the Court refused to entertain the motion to dissolve the injunction until the answers to the bill, as amended, were filed.

To these rulings of the Court, in allowing such amendment and in refusing to entertain the motion for a dissolution of the injunction until the answers to the amended bill had been filed, the defendant's counsel filed his bill of exceptions assigning the same as error.

VASON & DAVIS; WARREN & WARREN, for plaintiff in error.

LYON, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

[1.] This cause comes up on the allowance, by the Court, of an amendment to the complainant's bill; and the refusal of the Court, after the amendment, to entertain a motion to dissolve the injunction which had been granted against the prosecution of an action of ejectment. These motions were pretty much within the discretion of the presiding judge in the Court below, and unless that discretion was used contrary to the law and justice of the case this Court ought not to interfere with it.

The action of ejectment was instituted for the recovery of a tract of land known as number three hundred and fifty, in the first district of, formerly Baker, now Dougherty county. There are two demises alleged in the declaration, one from Samuel Disheroon and the other from Edward B. Hook. The complainant in the bill is defendant in the action of ejectment. He claims to be a *bona fide* purchaser of the land, and deduces his title, according to his bill, from the drawer. The allegations in the bill are, substantially, that Samuel Disheroon of Habersham county, drew the tract of land in dispute and a grant was issued to him about the sixth

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of Nov., 1821; that shortly thereafter he sold said land to John Jenkins, then of Habersham county; that the deed conveying the land to Jenkins is lost or destroyed, and that he is unable to establish its contents in a Court of law; that said conveyance was made prior to the year 1828; that Jenkins appointed Robert Lankford of Habersham county, his attorney in fact, to sell and convey the land, which he did to one J. P. Smith in April, 1829, but conveyed the said land in his own name without reference to his agency; that on the 24th Oct., 1829, Smith conveyed to W. C. Wiley, and endorsed the deed of conveyance which he held, to him, and transferred his title in that way in the presence of Benajah Williams and one McKinney Scott; that Wiley sold and conveyed the land, by the endorsement of the deed, to one Kenith Gillis, then of Cass county, but who subsequently removed to Virginia and died insolvent and without representatives; Smith and Wiley each conveyed the land by the endorsement and delivery of the deed executed to Lankford to J. P. Smith; that the said K. Gillis on the 8th Nov., 1857, sold and conveyed the said tract of land to one Milton Clayton; that on the 11th April, 1840, Clayton sold and conveyed to Alexander Shotwell, and his brother, Samuel Clayton, joined him in warranting the title; that Shotwell, on the 4th of March, 1850, sold and conveyed to Henry Hora and Lewis S. McGuire, and Joseph S. Smith joined him in the warranty of title; that Lewis S. McGuire sold his interest to Henry Hora, who on the 11th of April, 1851, sold and conveyed said land to complainant.

It is further alleged in the bill that the complainant entered into the possession of the land immediately after his purchase and has occupied it ever since. It was unoccupied when he bought it. It is further alleged that the defendant, E. B. Hook, confederating with Philip Martin, on the 8th day of Sept., 1853, while the complainant was in possession of the land, procured from the said Samuel Disheroon, the

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drawer, a quit claim deed for the consideration of twenty dollars; that said Disheroon told said Martin that he had sold and conveyed the said land to the said Jenkins; and that at the time of the said purchase by the said Hook, he knew of the purchase and possession of the land by the complainant. The bill prays a perpetual injunction of the action of ejectment and for further relief.

The defendant, Hook, answered the bill, and in his answer he denies any knowledge of the purchase of said land by Jenkins, and alleges that he does not believe it true, and assigns his reasons for his belief. He knows nothing of the mesne conveyances and endorsements of deeds from Jenkins down to complainant, and insists that complainant be held to the proof thereof, and of the consideration paid. He admits that, at the time he purchased the land, he had heard that Brooks, the complainant, or some one else, claimed the land, but as well as he then remembered, he believed the land was vacant.

The complainant proposed to amend his bill by making John Jenkins, William C. Wiley and John P. Smith, parties thereto, and by adding to the prayer, that the parties defendants may be compelled to execute legal conveyances to said land so as to perfect the legal title in the complainant, or that the assignments and transfers of title as set forth in the bill of complaint, may be decreed to be a legal title as against the defendants to the bill.

[2.] The allowance of this amendment by the Court is the first error assigned. The complainant might have made the amendment, as a matter of right, under the liberal act of the Legislature, respecting amendments. The persons made parties, if not *necessary* parties, are certainly *proper* parties, and the presiding Judge committed no error in permitting the amendment, for that purpose. Perhaps, all the relief necessary to the protection of the complainant might have been had under the general prayer, but an amendment making the prayer more special is certainly

permissible, and no error can be imputed to the Court for suffering it to be made.

[3.] But it is objected that the Court below ought to have entertained the motion to dissolve the injunction. The answer was before the Court, and with the admission of the defendant, Hook, that at the time of his purchase of the land, he heard that the complainant or some one else, was claiming it, the presiding Judge might well have deferred an argument on the motion to dissolve the injunction, until all the parties were brought before the Court.

The defendant does not deny that the complainant was occupying the land at the time of his purchase. He says *he believed it was vacant as well as he then remembered*, and goes into an argument to satisfy himself in regard to his memory.

We think that the Court committed no error, and that the circumstances of this case as disclosed in the bill and answer are such as to demand a hearing before a special jury.

Judgment affirmed.

DANIEL WINGARD, plaintiff in error, vs. NELSON TIFT, defendant in error.

[1.] A verbal license to erect a dam and fish traps, is not a license to renew the dam and traps as often as they may be swept away by the water.

[2.] At least, such a license, after the dam and traps have been swept away, is revocable at any time, before they are renewed.

In Equity, from Dougherty county, decision by Judge ALLEN, at Chambers, 13th Oct., 1857.

Motion to dissolve injunction on the coming in of the answer.

Wingard vs. Tift.

This bill was filed by Tift, in which he stated that he was the owner of lot 324 on Flint River, at Albany, and that his right extended to the centre of the stream; that he was also the owner of the ferry on lot 323. He states that the defendant, Wingard, was in the course of erecting a dam and fish traps for the purpose of catching fish in the river, which dam extended from the bank of the river, belonging to the complainant, and across the river to its centre—the effect of which would be to raise the water above the dam and depress it below, and cause a strong and dangerous current on the east side of the river and a reverse current below on the other side—that this cross current would be in the track of the ferry and make it very dangerous and greatly increase the expense to complainant of keeping up the ferry. That Wingard was insolvent; that the damages occasioned would be very considerable and could not be recovered by damages at law. He therefore prayed by his bill that Wingard might be restrained from completing the works, and that he might be protected in his property.

An injunction was granted as prayed by the bill.

The defendant in his answer did not deny the allegations contained in the bill as to complainant's right and title to the lot 324, nor to the ferry, but admits his title at least to part of it. In his answer he went on to state the works which were made in the river and alleged that an agreement was entered into between himself and Jesse Floyd and the complainant, in the year 1849, by which Tift agreed that these traps and a dam might be made in the river, the consideration being that he was occasionally to *have a mess of fish*; that under that agreement he erected the works; that in 1852 some malicious person destroyed them and that he again erected them in 1855; that in 1856 he repaired the same at great expense; that in 1857 the injuries caused to the works by the high waters were very great; that he was repairing that damage and that if the works were suspended great damage to the amount of \$7000 would be the result;

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that he had so far proceeded with the works that in ten days they would be completed. The defendant also admitted his insolvency, but denied that the works would be injurious to the plaintiff or increase the risk or expense of the ferry. The defendant also stated that in 1855 or 1856 the plaintiff had sued him in forcible entry and detainer, and that he, the defendant, had gained the case.

The defendant, upon filing his answer, moved to dissolve the injunction. Both parties submitted affidavits. The complainant in support of his bill and to rebut the answer. The defendant in support of the answer.

The Court overruled the motion to dissolve the injunction and counsel for defendant excepted.

There were also exceptions to the rulings of the Court in relation to the admission of the affidavits, and the right of complainant to the opening and conclusion, but as no opinion is pronounced by this Court on these exceptions, they are here omitted.

STROZIER & SMITH, for plaintiff in error.

LYON & IRWIN, *contra*.

By the Court.—BENNING J. delivering the opinion.

Ought the Court to have dissolved the injunction?

This depends upon, whether the equity of the bill, had been sworn off by the answer.

The answer says: "that some time during the year 1849, complainant granted and gave to defendant, and one Jesse Floyd, the right and privileges of putting into the waters of Flint river, on his pretended soil and bed of said stream, and lying opposite said lot of land, 324, as many fish traps, as defendant and said Floyd desired, without regard to the number thereof, kind, or manner of locating them, asking and requiring in consideration therefor, a mess of fish occasionally;" and that during that year, the defendant

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(Wingard) and Floyd accordingly built a dam and put in traps.

[1.] This was a license to build a dam and put in traps, in 1849, not in 1857. There is nothing in the *terms* of this license, to give to Wingard and Floyd, the right to renew the dam and traps *ad infinitum*, as often as they might be swept away by the waters. The dam and traps had been, twice or thrice, swept away before 1857, when the last renewal was about to be made, to prevent which the bill was filed.

[2.] Again, there is no dispute, that such a license is revocable, if its revocation does no damage to the person to whom, it has been granted. Therefore if Tift had chosen to revoke this license, before the first dam and traps had been put in, he might have done so. In that case, the license could not have been the means of putting Wingard and Floyd, to any expense. So, Tift might revoke the license at any time after the dam and traps had been swept away, for then, things would stand just as they stood in the beginning. This Tift, once and again, did do. His forcible entry and detainer suit, brought in 1855, or 1856, to prevent the renewal of the dam and traps—a renewal then first undertaken although they had then been swept away as long before as 1852, was, itself, sufficient evidence of a revocation.

The present bill of Tift, is further evidence of the same thing, and it was filed before Wingard had begun to put in the new dam and traps. *Hall vs. Boyd & Campbell*, 14 Ga. R. 1.

This defence, then, set up in the answer, is not sufficient; and this, is the whole defence. The Court, therefore, was right in refusing to dissolve the injunction.

I must say too, that in my opinion, a verbal license is within the statute of frauds; and therefore, that, whether acted upon or not, it is revocable at any time, at the option of the licensor. And this, I think, is the clear result of the

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English cases, as they stand at present. See *Wood vs. Leadbetter*, 13 *Mas. & W.*, 838; *Cocker vs. Cooper* 1, *Cromp. M. & Ros.* 418; *Hewlans vs. Shippam*, 5 *B. & C.* 222; *Bryan vs. Whistler*, 8 *B. & C.* 288; *Wallis vs. Harrison*, 4 *M. & W.* 538; *Sug. Ven. & P.* 137.

The case of *Sheffield vs. Collier*, 3 *Kelly*, is, perhaps, not necessarily adverse to this view. In that case, the two Colliers were *joint tenants* of the whole lot, each, therefore, by *virtue of this tenancy*, was rightfully in possession of the *whole* lot. The agreement between them, amounted to an agreement, to *partition* the land a certain way, such a way as to give to one brother, the right to use the part that was to go to the other, for certain purposes. Here, was, at least, a plenty of *consideration*. Sheffield merely succeeded to the right, whatever it was, of the latter brother, becoming himself tenant. In such a case, it may, perhaps, be true, that an action of *trespass* would not lie.

And, then, there is the principle of *contribution* among joint tenants and tenants in common—a principle, which, perhaps, may have some bearing in such a case.

Judgment affirmed.

DAVID RIDLEY, plaintiff in error, vs. FORD & GIDDENS, defendants in error,

Plaintiffs holding note and *fi. fa.* in pawn for payment for a coat sold to the holder, is not entitled to recover the money against the maker of the note and defendant in *fi. fa.*, if there was a prior contract between the parties that the debt should be paid in corn, and the corn was delivered in payment. If the contract was subsequent to the delivery of the papers in pawn, the plaintiffs were entitled to recover the value of the coat and nothing more. If the verdict of the jury was not against the weight of evidence, it ought not to be disturbed.

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Certiorari, from Worth county. Decision by Judge Powers, at October Term, 1857.

One Spencer Brown, being indebted to Ford & Giddens, traded or transferred to them in payment of his debt, a promissory note which he held on David Ridley, for about twenty-eight dollars, and also a *fi. fa.* against him, issued from a Justice's Court, for about twenty-six dollars.

Ford & Giddens sued Ridley on the note in a Justice's Court, and had the *fi. fa.* levied on his property.

Ridley filed illegality to the *fi. fa.*, and plead payment as to the note. Both issues came on to be tried at the same time, when Ridley proved that he had agreed to let Brown have corn in payment of them; that he delivered one turn of corn to Brown's widow, Brown having died, when Giddens notified him not to pay the corn, as he should not give up the papers; and that he had delivered the residue to his widow; and that he had thereby fully paid of and satisfied both the note and *fi. fa.*

The Justices gave judgment for the defendant Ridley in both cases, and upon appeal, the jury found for him on the note, and sustained the illegality to the *fi. fa.* Whereupon, Ford & Giddens sued out a *certiorari* and had the causes certified, for review and correction, to the Superior Court.

Upon the hearing before Judge Powers, he remanded the cases, with orders to the Justices to enter judgment for Ford & Giddens, for the amount of the note, and counsel for Ridley excepted.

R. H. CLARK, for plaintiff in error.

JNO. B. COLDING, *contra*.

By the Court.—McDONALD, J. delivering the opinion

The plaintiffs sold one Spencer Brown a coat, for which he was to give them a note on some third person. He had

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delivered to Giddens, one of the plaintiffs, a note and *fi. fa.* on the defendant in the Court below, who is plaintiff in error here, to be handed to a collecting officer, and told Giddens at the same time, that if he never brought him any other note, he was safe any how, that he could keep the note and *fi. fa.* Giddens, in a conversation with Garry G. Ford, told him that he had the note and *fi. fa.*, and if Ridley would make him safe for the payment of the coat bought by Brown, he would give up the papers. Giddens afterwards refused to do it, and claimed to hold them in pawn for what Brown owed him. It does not appear at what time the contract was made between Ridley and Brown when the latter agreed to receive the corn in payment. If it was prior to the time that Brown agreed to let the plaintiffs keep the papers in pawn for payment for the coat, the delivery of the corn according to the contract, was a payment of both *fi. fa.* and note; if subsequently, the plaintiffs were entitled to recover the value of the coat and no more. There was no evidence of the value of the coat before the jury. It is not so manifest that the verdict of the jury was decidedly against the weight of evidence, as to entitle the plaintiffs to a new trial; and it is clear that they are not entitled to a judgment for the twenty-eight dollars.

Judgment reversed.

EDMUND RAINES, plaintiff in error, vs. SAMUEL P. CORBIN and wife, defendants in error.

A testator, after giving to his wife, a large part of his property, said: "This devise and bequest of the foregoing property, real and personal, to be in lieu and in bar of dower, and of the usual allowance to widows for their year's support, and in lieu and in bar of all other claims upon my estate in any way whatever." After making the will, he acquired other lands.

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Held, That the case was one in which the widow was bound to elect, whether she would take the legacy, or take these after acquired lands.

In Equity, from Bibb. Decision on demurrer by Judge LAMAR, November Term, 1857.

The bill in this case was filed by Edmund Raines against Samuel P. Corbin and wife, and Charles E. Moon executor, and alleges that Cadwell W. Raines, late of the county of Bibb, departed this life in January, 1856, leaving in full force his last will and testament, wherein said Moon was appointed executor, who duly qualified. That testator, after the making of his said will, purchased about seven hundred acres of land situated in the county of Upson, which he died seized and possessed of, and undisposed of by said will. That the executor by virtue, as he supposed, of the powers vested in him by said will, after due and legal publication, offered said land at public outcry to the highest bidder, when complainant became the purchaser at the price of \$1,800, and received from said executor a conveyance of the same duly executed, and paid, agreeably to the terms of said sale, one-half the purchase money in cash, and gave his note for the other half, payable 25th December, 1857, and which note is yet unpaid in the hands of said executor, complainant entered into possession of the premises, and has made thereon many valuable improvements, and at the time of his purchase he knew not that said lands had been acquired by testator subsequently to the execution of his will.

The bill further states that said Cadwell W. Raines left as his only heir at law, his widow, Parthenia Raines, who has since intermarried with Samuel P. Corbin of the county of Bibb, but who at the time of the sale of said land, was unmarried, and who appointed an agent to attend and represent her at said sale, and who made no objection in any manner thereto. That she also received the legacies bequeathed to her in and by the will of her husband, which legacies amounted to a very large share or proportion of his estate,

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and worth some eighty thousand dollars or other large sum, and which the testator declared in his will was given to her in release and discharge of all other claims by her upon his estate, and that said Parthenia received the whole of said legacy from the executor before her marriage, and executed receipts for the same.

The bill further states that said Corbin and wife have instituted their action of ejectment against complainant to recover said premises bought under the circumstances above mentioned; and that he is in danger of being evicted therefrom. That the executor has sold all the estate of his testator not specifically disposed of, and has paid out and distributed the larger portion thereof to the legatees, and is preparing to make a final distribution and settlement thereof, and intends as soon as he winds up said estate to remove to Texas, where he now has a plantation, and where he spends the largest portion of the year. That complainant is a brother of testator and a legatee under his will; but a large number of the legatees reside out of the State. The bill prays that the action of ejectment be enjoined; that Corbin and wife be compelled by decree to relinquish all right, title and claim in and to said lands, or that Mrs. Corbin be put to her election, and take the estate bequeathed and devised to her by the will, or the after acquired property as his heir at law. And in the event that the Court should be of opinion that Corbin and wife are entitled to said premises that the executor be decreed to pay over to them the purchase money of said land, in satisfaction of their claim thereto, and that he be enjoined from the further payment of the balance of said estate in his hands, and from transferring the said note, until the further order of the Court.

It was agreed that Mrs. Corbin is the sole heir at law of Cadwell W. Raines the testator, and that the executor has in hands funds belonging to the estate sufficient to protect Edmund Raines.

To this bill, Corbin and wife demurred.

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The Court sustained the demurrer and dismissed the bill, to which decision complainants by their counsel excepted.

STUBBS & HILL, for plaintiffs in error.

L. N. WHITTLE, *contra*.

By the Court.—BENNING, J. delivering the opinion.

The Court sustained the demurrer, and dismissed the bill. In doing so, was the Court right? This is the question.

The argument in support of the bill, is put on two grounds, the *will*;—and the *conduct* of Mrs. Corbin, amounting as the argument insists, to an estoppel.

As to the first ground:

It is maintained by the counsel for the defendant, and not denied by the counsel for the plaintiffs, that the lands acquired by the testator after the making of the will, did not pass by the will, even if it was the intention of the testator, that they should pass by the will. Admit this to be true. Then, the testator died intestate as to those lands.

The testator's widow, now Mrs. Corbin, was the only heir. Did those lands pass to her as such heir?

If it was the *intention* of the testator that she should not take, of his estate, any part but the legacy he gave her, and therefore, that she should not take these lands, then she cannot as heir, or otherwise, take the lands, without giving up the legacy. In other words, if such was his *intention*, the case is one in which, she must elect, whether she will take the legacy or take the land. This, I think, is clear upon authority. *Churchman vs. Irelan*, 4 Sem. 520; *Thelluson vs. Woodford*, 13 Ves. 209; *White & Tudor Eq.* 251, 258; 2 *Stor. Eq.* 1,094.

She certainly does not as heir stand any more nearly related to these after acquired lands, than she does as doweress, to a third of all the lands, including that held by the testator, when he made the will; and there can be no doubt, that

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if it was his intention that she should take the legacy in lieu of dower in all the lands, that the case would be one in which, she would have to elect between the legacy and her dower. 2 *White & Tudor* 263.

The question, therefore, becomes this—*was* it the intention of the testator, that the legacy should be all that she was to have of his estate? Let us look to the will.

The testator, after having given to the widow land and negroes and other property to the value of \$70,000 or \$80,000, uses the following language: "This devise and bequest of the foregoing property, real and personal, to be in lieu and in bar of dower, and of the usual allowance to widows for their year's support, and in lieu and in bar of all other claims upon my estate, in any manner whatever."

"Claims upon my estate,"—by these words the testator must have meant, claims against what might be the property which he would have *at his death*, not claims against what was, or might be the property which he had, or might have, *whilst he was living*. It was impossible that she could have any claim against his estate, whilst he was alive. That this was his meaning, must be too clear for doubt.

The claim of the widow to these afterward acquired lands, is, then, a claim "upon" his "estate." But it was his intention, that the legacy should be in lieu of all claims "upon" his "estate;" therefore, it was his intention, that it should be in lieu of this claim.

It follows, then, that the case is one in which, she must elect whether she will take the legacy or take these lands.

I think, then, that the first ground on which the argument in support of the bill, is put, is a good one. In this opinion, Judge LUMPKIN agrees with me; but Judge McDONALD does not. Judge McDONALD, however, thinks that the second ground in support of the bill, is good—an opinion in which, I differ from him.

In the opinion, then, of all three of us, there is equity in

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the bill. There is unanimity in the conclusion, if not in the premises.

But if there *was* equity in the bill, the Court erred in sustaining the demurrer.

I have hitherto accepted the admission of the counsel on both sides, that these after acquired lands could not pass by the will, even if it had been the testator's intention, that they should. In doing so, I strongly incline to think, that I have accepted what ought not to be accepted. I speak for myself.

The admission might be proper under the old law. The reason of the rule there was, that a man could not convey any land, except that of which he was *seized*; and that a will is a *conveyance*, even in the testator's *lifetime*. This last ground is, in truth, false even by the old law. A will by that law is ambulatory as to realty, as much as it is, as to personalty. But let that pass.

It is not true by the law of this State, that a man cannot convey any lands, but those of which he is seized. He may sell a chance in a land lottery. He may sell land held adversely to him,—the 32 Henry 8, not being a part of the law of this State. *Doe ex Dem, Morris vs. Monroe*, 23 Ga. R. 82.

Again, by the act of distribution, realty is put upon the same footing, as personalty. Realty goes, not into the hands of the heir, as in England, but into the hands of the administrator; and to it *probate* extends, as much as it does, to personalty.

I strongly incline to think, then, that a testator may, as much dispose of land to be afterwards acquired, as he may, of personalty to be afterwards acquired.

Judgment reversed.

GEORGE KERSH, plaintiff in error, vs. **THE STATE OF GEORGIA**,
defendant in error.

- [1.] An indictment is sufficiently technical and correct if it state the offence so plainly that it may be easily understood by the jury.
- [2.] In an indictment for forcible entry and detainer, the prosecutor who was dispossessed, or from whom the possession is detained, is a competent witness.

Indictment for forcible entry and detainer, from Worth County. Tried before Judge POWERS, April Term, 1857.

George Kersh was indicted for forcibly entering into certain premises occupied by Robert G. Ford, and expelling him therefrom and detaining the possession with force and arms, and contrary to law.

The defendant pleaded not guilty.

Robert G. Ford, the prosecutor, sworn, testified, that the lot of land in question had been in possession of himself or his tenants for 17 or 18 years. In the spring of 1855, a portion of the fence around a field covering lands in lots No. 2 and 3 was burnt; (No. 2 is the lot from which prosecutor was expelled,) seven or eight acres of No. 2 was embraced in this field. After the fence was burnt, Kersh moved the rails and enclosed that part of the field on No. 2, and has kept possession of it ever since, refusing to give it up. Previous to the finding of the indictment, he made a demand on Kersh for the land, in the court-house in the county of Worth, and he, in a violent and threatening manner, refused to deliver the possession, and said if he bothered him about the land, he would shoot him; if he didn't, damn his soul; that he should never have the land; if he did, it would be the last of him.

Another witness was sworn, who confirmed and sustained Ford as to the demand and defendant's reply; and similar language by Kersh about Ford was proved by other witnesses; that when Ford approached him in the court-house, he

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did it civilly and politely; that there was and had been for some years a bad and bitter state of feeling between them. There was in the whole clearing some fifteen or twenty acres; it was not attached to Ford's plantation; there was a wood lot between them; that Kersh fenced on lot No 2 about a quarter of an acre adjoining his plantation, and from the appearance of the fence, it might have been done four or five years. In the spring of 1855, a tenant of Ford's commenced ploughing on the cleared land, but when the fence burnt, he gave it up and went off. Some time elapsed after the burning of the fence before Kersh enclosed and took possession of the land cleared on lot No. 2. At the time he took possession there was no dwelling or other house on either of said lots, and no one was working it at the time, or living on it.

A witness proved that he and another man cleared the land about twenty-four (24) years ago, and after they left, Ford took possession, some eighteen years ago, and had retained the possession, either by himself or tenants, until the spring of 1855, when Kersh took possession.

The jury found the defendant guilty of forcible detainer.

Counsel for defendant moved in arrest of judgment, on the following grounds,

1st. Because the charge in the indictment is not in the language of the penal code, or in words equivalent thereto.

2d. Because the indictment is for the two offences of forcible entry and detainer.

3d. Because the verdict is only for one, and not a general verdict—the two being necessarily combined on the trial.

The Court overruled said motion in arrest of judgment, and counsel excepted.

Counsel for defendant then moved for a new trial.

1st. Because the verdict was contrary to evidence.

2d. Because the verdict was contrary to the weight of evidence.

3d. Because the verdict was contrary to law.

4th. Because the Court erred in admitting the evidence of Ford, who was prosecutor and claimed the possession of the land in dispute, and entitled to restitution, and was, therefore, interested in the event of the prosecution, and objection having been made to his competency when sworn, and which the Court overruled.

5th. Because the Court erred in charging the jury, that the detaining said land, there being no dwelling, and in the situation it was in, if forcibly detained, was a violation of the statute, if they were satisfied that Ford had been recently in peaceable possession and having the right of possession.

6th. Because the Court erred in charging the jury, that any threat or menaces by defendant, or otherwise keeping Ford out of possession of the land which he had possession of at the time Kersh took possession, or shortly before, made him guilty of forcible detainer.

7th. Because, under the pleadings and evidence, there should have been a general verdict of guilty or not guilty on both charges.

The Court overruled all the grounds for new trial, and refused the same, and counsel for defendant excepts and tenders his bill of exceptions.

CLARK & JOHNSON, for plaintiff in error.

STROZIER; and HALL, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

On the argument of this cause in this Court, all the assignments of error were abandoned except those founded on the motion in arrest of judgment, and the refusal of a new trial on the ground that Ford was an incompetent witness; and that the verdict of the jury was contrary to evidence.

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The Judge held that the plaintiff was not entitled to recover, and ordered a nonsuit.

To which decision counsel for plaintiff excepted.

LAMAR & LOCHRANE; and SPEER, for plaintiff in error.

STUBBS & HILL, *contra*.

By the Court—McDONALD, J. delivering the opinion.

Upon the agreed facts of this case, it appears that the defendant had notice that the slave mortgaged was held in trust for the wife; that she was her separate property, and that she was in no wise to be subject to the debts or contracts of her husband.

These are the terms of the trust as set forth in the statement of facts agreed to. Instead of telegraphing the trustee, the wife was telegraphed, and she it was who sent a dispatch that her husband had a right to mortgage the negro. It does not appear that the money was raised for the benefit of the trust; but on the contrary, the inference is, that it was for a contract or debt of the husband, which is expressly forbidden in the trust. In the case of *Kempton vs Hallowell & Co.*, decided by this Court at the last January Term, this point among others was brought before this Court for its determination, and a majority of the Court held that, when property was settled in trust for the wife, not to be subject in any manner to the contracts, debts or engagements of the husband, the wife could not bind it for that purpose.

There was no dissenting opinion delivered in that case, as there was no difference of opinion on many points which controlled the merits of the case. The Courts in England, as well as in this country, until a comparatively recent period, held, that where property was held in trust for a married woman who was entitled to receive for her own use the entire proceeds of it, and there was no limitation over, she had the power, as one of the incidents of property to alien or dis-

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pose of it, absolutely, she being considered a *feme sole*, as to her separate property. Modern decisions have restricted this power, and have allowed the instrument of settlement to control the right. The first innovation was where there was a positive restriction upon alienation, called a clause against anticipation, in the deed of settlement.

It has been since held "that a direction to pay the income, from time to time into the proper hands of the wife, is sufficient of itself to deprive her of the absolute disposing power over the whole interest." *Hill on trustees* 615, 2d Am. Ed.

The remarks of Lord Chancellor Loughborough, in the case of *Milnes vs. Bush*, are not without force; and why the maxims of the common law and the principles of Courts of Chancery should be disregarded, in a relation in which a most powerful and controlling influence exists, is difficult to be accounted for. He was unwilling to admit the doctrine, that the wife was to be considered as a *feme sole* in respect to her separate property, so far as her husband was concerned, for he says: "that all the maxims of the common law and the care and prudence of this Court as to married women, with respect to their husbands, so liable to influence, should be totally set aside without any form, not only the guards the law has established and the course of this Court, with regard to trust estates in equity, but without the common precaution which would attend the transactions of persons under a degree of influence, that she should be considered a *feme sole quoad* her husband and in transactions between them, would require great consideration." 2 *Vesey Jr.* 498.

In the case before us, according to the construction which this Court has placed upon an instrument of the same purport, neither the trustee nor the *cestui que trust*, could dispose of the slave, for the benefit of the husband or upon his contract or for his debts. This case perhaps illustrates strongly the propriety of adhering to the rule, that would

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prohibit the wife from dealing with her husband or for his benefit, as a *feme sole*, with respect to her separate property.

Judgment reversed.

ALEXANDER RICHARDS, plaintiff in error, vs. THE BIBB COUNTY LOAN ASSOCIATION; defendant in error.

- [1.] The method for the foreclosure of mortgages, given by the judiciary Act of 1799, is not confined to mortgages made to secure *liquidated* demands.
- [2.] When a mortgage is foreclosed by "The Bibb County Loan Association," the sum for which the judgment is to be entered, is such a sum as will, by the constitution of the association, be sufficient to redeem the property on the day of the judgment, at the rate of premium at which, the funds of the association are then selling.

Foreclosure of mortgage, from Bibb. Decision by Judge POWERS, November Term, 1857.

This cause coming on for a new trial, after the decision of the Supreme Court reversing the former judgment of the Court below, (see 21 *Ga. Rep.*, p. 592,) defendant Richards, in addition to the cause previously shown and pleas filed, further insisted that said *rule nisi* was insufficient in law to require any answer, and that plaintiff was not entitled to any judgment absolute thereon. The Court overruled the showing as insufficient, and defendant excepted.

Defendant further pleaded, that by the terms of the contract, nothing was due from him to plaintiff, whereby the mortgage could be foreclosed under and by virtue of the statutes of said State, and in support of this plea relied upon the 7th section of the 8th article, and the 3d section of the 9th article of the constitution of said association. The Court overruled and disallowed the plea, and defendant excepted.

Defendant further pleaded, that plaintiff could only have judgment absolute for the original sum loaned, and secured by the mortgage, to-wit: the sum of \$975 00, and that he had paid thereon \$170 00, in monthly installments, and was entitled to a credit therefor. Plaintiff, thereupon, entered a credit upon the mortgage for said sum. Whereupon, the Court overruled the plea, and held the same insufficient to prevent judgment absolute being rendered. To which ruling defendant excepted.

Defendant insisted and moved that the issues presented by his said pleas, as also the issues presented by pleas marked Nos. 1, 2, and 3, theretofore filed in said cause and verified, should be submitted to, and tried by a jury, or referred to an arbitrator, in terms of the statute in that regard. The Court overruled the motion, and defendant excepted.

Plaintiff then read the bond and mortgage, and the assignments of stock by defendant to plaintiff; and further read extracts from the books of the association, showing the balance due by defendant on said mortgage to be \$1,353 40, and closed.

Defendant again insisted that plaintiff had not made out such a case, under the provisions of said constitution, as entitled him to a judgment, and claimed that the same should be referred to a jury or an arbitrator, to ascertain the amount of said indebtedness, if any. All of which the Court overruled and disallowed, and defendant excepted.

And, therefore, the Court gave judgment for the plaintiff, for the sum of \$1,353 40. And to which judgment defendant excepted.

E. A. & J. A. NISBET, for plaintiff in error.

LANIER & ANDERSON; and BAILEY, *contra*.

By the Court.—BENNING, J. delivering the opinion.

The three pleas all, are nomore than demurrers. They all rely upon facts apparent on the face of the *rule nisi*. Their decision, then, was for the *Court*, and not for the jury.

The reasons urged in support of the first two, were these: 1st, that the demand was an *unliquidated* one, and that the statute of 1799, providing for the foreclosure of mortgages, does not extend to the case of a mortgage to secure an unliquidated demand; 2dly, that the demand was such, that the judgment of foreclosure, would have to be one that would have to depend for its amount, on something to be ascertained after its rendition; viz: "the rate of premium" at which, the money of the association would be selling, at the time of the sale of the mortgaged property, made under the foreclosure judgment.

Neither of these reasons seems to us good. As to the first of them.

[1.] There is, in the Act of 1799, nothing that confines the mode of foreclosure, given by the Act, to cases of liquidated demands. The words are general;—"The method of foreclosing mortgages on real estate," &c.

There is nothing in considerations of convenience and expediency.

As to the second of the reasons. The association, by its constitution, is authorized to retain out of the proceeds of property sold by it, under mortgage, such a sum "as would be required to redeem the property." The association must, therefore, be entitled to have such a judgment as will authorize it to retain this sum. *Art. 8, sec. 7*

What is this sum?

"Should any stockholder desire to have his or her property discharged from mortgage before the association shall have regularly terminated, he or she shall be allowed so to do, by paying into the hands of the treasurer such a sum of money

as shall, at the rate of premium the funds are then selling at, produce the same monthly payment of interest as that which said stockholder had been previously paying on his or her advance; provided such sum shall in no case be less than the net amount actually received by him or her." *Art. 9, sec. 3.*

This sum, then, is "such a sum as shall at the rate of premium the funds are then" (the time of the redemption) "selling" at, "produce the same monthly payment of interest," &c.

Can it be ascertained beforehand—at the time of the judgment of foreclosure—what "such a sum" will be?

Sufficiently, we think, for all practical purposes. The sale of the mortgaged property, ought to take place in two or three months after the judgment of foreclosure. The price of money does not, in general, fluctuate appreciably, in the course of two or three months. It may be assumed, therefore, that a sum which would be sufficient to redeem the property at the date of the judgment of foreclosure, will be the sum that will be sufficient to redeem it when the day of sale arrives.

The sum that will be sufficient to redeem the property at the time of the judgment, may be ascertained at that time. The premium at which the money of the association would then sell, if offered for sale by the rules of the association, will be the test. And it may be assumed, that this premium will be the same that it was, at the last preceding monthly meeting. In the present case, this meeting happened on the same week on which the judgment of foreclosure was rendered, and just before its rendition. What the premium was at the last monthly meeting, may be easily ascertained by proof.

This premium found, the sum that would be sufficient to redeem the property at the date of the judgment, may be ascertained. This sum, when ascertained, may be taken as the sum that will also be sufficient to redeem the property, when the day of its sale under the mortgage, shall have come; and therefore, as the sum, which the association will, on that day, be entitled "to retain."

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Thus then it *can* be ascertained at the time of the judgment of foreclosure, what will be "such a sum" as the association will be entitled to retain at the subsequent time of the mortgage sale.

When "such a sum" has been ascertained, that is the sum for which the judgment is to be entered.

But should it turn out, that, from extraordinary causes, money shall materially rise, or materially fall, in the short time intervening between the day of foreclosure, and the day of sale, the party affected by the change, would not, I think be without remedy. Every judgment yields to matter *ex post facto*, and why not this? The facts when presented to the Court in the proper way, would I think, be received, and allowed their full efficacy in modifying the judgment.

[2.] We think, then, that the second reason assigned in support of the first two pleas, was not well founded. We think, that the sum for which the mortgage was to be foreclosed, was such a sum as would, by the constitution of the association, be sufficient to redeem the property on the day of the judgment of foreclosure, "at the rate of premium" at which the funds were then selling.

What has just been said of the first two pleas, is sufficient to show, that the third plea was also insufficient. Whether the sum for which, "judgment absolute" was to be entered, was to be "the original sum loaned" only, or some larger sum, would depend on the rate of premium at which the money of the association might be selling at the time of the entering of the judgment.

The pleas presented no issue of *fact*. They did not so much as say, *nil debet*. They presented, then, nothing for a jury to try.

The evidence submitted by the association, consisted of the bond and mortgage and assignment of stock; and also of the books of the association, on which books was this entry: "Statement of the balance due by Alexander Richards, on mortgage to Bibb County Loan Association, November 27,

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1857:" (the date of the judgment was 1st December, 1857.)

No. 2. Mortgage 20 June, 1854	-	-	-	\$2,000 00
25 months interest unpaid to 19 Nov.	-	250	00	
3 fines	-	-	-	12 00
Cash paid insurance	-	-	-	42 00
				304 00
				\$2,304 00

Credit.

By 10 shares of stock 17 mo. pd.	-	170	00	
Less expense	-	-	-	19 40
				150 60
Premium at 40 per cent	-	-	-	800 00
				950 60
				\$1,353 40

The counsel for Richards insisted, that this evidence did not make out such a case as entitled the association to a verdict. We think that it did. It showed what was the rate of premium five days or fewer, before the time of the trial. It may be assumed, that the rate remained the same to the day of the trial.

The Court gave judgment for the \$1,353 40, and that judgment is excepted to. But as far as we can see, it seems to be supported by the evidence.

Judgment affirmed.

JOHN S. RICHARDSON, trustee, plaintiff in error, vs. JOHN S. HOGUE, defendant in error.

That a witness is interested will not be presumed; it must be proved.

Complaint, from Bibb.

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By the Court.—BENNING, J. delivering the opinion.

The plaintiff offered the interrogatories of James Richardson, as the interrogatories of “an aged and infirm person.” They were objected to, on the ground “of interest.” The Court sustained the objection. Was the Court right in doing so?

On the 18th of February, 1846, James Richardson conveyed the negro to John S. Richardson, on certain trusts.

In 1853, James Richardson conveyed the negro to Hoge, the defendant, in consideration of the receipt of \$525—a sum less than her value, according to the testimony of some of the witnesses, and warranted the title to Hoge.

It was stipulated between him and Hoge, that he was to have the right to redeem the negro at \$525, and interest thereon. Hoge was notified of the first deed.

Was James Richardson interested to have the verdict go against Hoge, and for the trustee?

If the stipulation as to redemption, was binding, James Richardson’s interest was balanced. This becomes manifest on a little reflection.

And whether the stipulation was binding or not, depended on, whether it was a fraud in Hoge, to obtain an absolute bill of sale of the negro, for a sum of money greatly less than her value, upon an assurance to Richardson, that he might have her again on repaying that sum and interest. *Cobb’s Dig.* 274. And we are not prepared to say that it was not a fraud. The question arising in this collateral way, it is not necessary to say more than this: that it does not appear but that this might have been a fraud in Hoge.

But unless it appeared that this was *not* a fraud in Hoge, it could not appear, that Richardson was interested in having the verdict go against Hoge. And that a witness is interested, will not be presumed; it must be shown affirmatively.

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We think, that James Richardson was not disqualified by interest from being examined.

We think, too, that the evidence showed him to be "an aged or infirm" person, in the sense of the Act of 1811. This, indeed, was not, I believe, denied by the counsel for Hoge.

It follows, that we think, the judgment excluding his evidence, erroneous.

On the other questions, the two Judges presiding, (McDonald and Benning,) disagree; as to them, therefore, no judgment can be pronounced.

Judgment reversed.

DAVID REID and others, plaintiffs in error, vs. THE MAYOR AND COUNCIL OF THE CITY OF MACON, and others, defendants in error.

Injunction dissolved on the denial of the equity charged in the bill, the affidavits in support of the equity not being sufficient to overcome the denials of the answers.

In Equity from Bibb. Decision on motion to dissolve injunction, by Judge POWERS, November Term, 1857.

The bill in this case was filed by David Reid and others, citizens of Macon, and owners and occupants of certain houses and lots in said city, against the Mayor and Council of said city, and Joseph M. Boardman to restrain and enjoin defendants from building and constructing a certain branch sewer in said city, which they had commenced, and also to compel said Mayor and Council to extend a certain main

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sewer from its present terminus, on to or near the Ocmulgee River.

The bill alleged that said main sewer received and conveyed large quantities of water and noxious and offensive liquids and matter from cellars, stables and privies, which it discharged into the street near the residences of complainants, whereby the atmosphere in the neighborhood was rendered impure and offensive—the health of the adjoining lots injuriously affected, and the value of the property greatly impaired, and much sickness and many deaths in the vicinity, occasioned by the foul, fetid affluvia and malaria thrown out and arising at the terminus of said sewer.

That Boardman, under a contract from the Mayor and Council, was proceeding in the construction of another sewer connecting with the main one already built, and which when completed would increase the amount of water and matter discharged at its terminus, and render still more unwholesome and sickly its vicinity.

The bill was read and sanctioned and the injunction granted.

Boardman answered, that he had by virtue of an agreement and contract with the City Council, begun the construction of the branch sewer complained of, but that his purpose in building it was to convey and carry off the rain water which fell upon and about his house and lot, and that so far from being an injury to complainants, or increasing the evils and nuisance of which they complained, it would, by throwing a larger volume of water into the main sewer, more effectually wash and carry off the deposits at its mouth; and further, that the water which he proposes to carry off, would flow through the streets into the main sewer already built, and could in no event increase the grievances complained of.

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The Mayor and Council answered, that said main sewer had been constructed many years before at a great expense to the city, and without objection from any of the owners of the houses and lots in the vicinity of its terminus; and that so far from deteriorating the value of property in the neighborhood, it had greatly enhanced since the building of said sewer; that most of the complainants had purchased there since the sewer was built, and had no right to complain. They deny that the adjoining and adjacent residences are more sickly than other portions of the city, or that any deaths have resulted from its existence. They aver that it is of great utility and benefit in the drainage of that part of the city through which it runs, and that its extension to the point desired and indicated by complainants would involve an expense greater than the city at present is able to meet.

Upon hearing the bill, answers, and affidavits, in support of the bill, the Judge dissolved the injunction.

Whereupon counsel for complainants excepted.

LANIER & ANDERSON, for plaintiff in error.

E. A. & J. A. NESBIT, *contra*.

By the Court.—McDONALD J., delivering the opinion.

The City Council had granted permission to Boardman and others, "to build a sewer to drain the cellars of their lots on Mulberry street between second and third streets, so as to discharge the water from said sewer at such place as may be agreed upon by the said Boardman and others, and the street committee." The bill alleges that Boardman, Denham and others had commenced, and were then engaged, in conjunction with the Mayor and Council of Macon in building and constructing a branch sewer designed to connect with a main sewer described in said bill, at a place sta-

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ted by complainants in their bill, and complainants allege that said branch sewer is intended to convey the waters and drainings of the privies and other places in and about the new buildings on the lots of Boardman, Denham and others, contrary to their natural course and channel into the said main sewer, to be conducted by it to its terminus. The terminus of the main sewer is on and near the lots of complainants, and conveys and deposits there the filth drained into it from livery stables, privies, kitchens, &c. along its line, and creates an intolerable nuisance, not only annoying the complainants with an insufferable stench, but engendering disease and fatal sickness.

The Mayor and Council answer, that by express understanding with Boardman and others, the branch sewer is to carry off nothing but the water which may, from time to time, accumulate in the cellars.

Boardman answers, that the branch sewer will neither make nor contribute to make a nuisance, and assigns as a reason, that nothing is to be drained through it from the cellars, but the water that may accumulate there according to the agreement with the Mayor and Council. The affidavits in support of the bill, except that of McElroy, have reference to the main sewer and the effects of its deposits. McElroy swears that the tank and pipes are so constructed that they may be used for carrying off into the cellars below the washings of the privies and water closets. We must construe the answer of Boardman according to its terms, and doing that, we must say, that notwithstanding tanks, pipes and conductors, may be constructed conveniently for the objects stated by McElroy, yet nothing more is to be drained than the water which accumulates in a natural way in the cellars. It cannot be, that water which is carried there by artificial means is an accumulation in the sense of the agreement with the City Council. If the defendants should use the sewer, hereafter, for any such purpose, an application may be made to the Court for a renewal of the injunction,

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unless the main sewer should be so extended and covered as to protect the plaintiffs from the injury and annoyances complained of in their bill. As the judgment of the Court excepted to has reference to the branch sewer only, we affirm it.

Judgment affirmed.

MARY GLEATON, plaintiff in error, vs. JOHN B. LEWIS AND SON, defendants in error.

A donee of property from a person just before his death, taking or retaining possession of the property, the deceased having died at her house, becomes executor *de son tort*, if there are creditors.

Assumpsit from Worth. Tried before Judge POWERS, October Term, 1857.

John B. Lewis and son, brought suit against Mary Gleaton, as executrix of James C. Gleaton, deceased, on three notes, amounting to about eighty dollars, due to them by deceased.

Defendant pleaded *ne unques executor*.

Plaintiffs read in evidence the notes; they then offered a deed of gift from the deceased to defendant, who was his mother, of "one chesnut sorrel mare, one hundred and fifty dollars in money, and also the amount due him by Jacob J. Slappy, and the amount of corn I now possess;" dated 16th February, 1853, and recorded on the 9th May, 1853. They also proved by the subscribing witnesses, that this deed was executed on the same evening, or the evening before James C. Gleaton died; that it was voluntary and without any other consideration than love and affection, as recited in the instrument; that the mare was worth \$125.

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Plaintiffs closed, and defendant moved for a nonsuit. The Court refused the motion, and defendant excepted.

Defendant then asked the Court to charge the jury that plaintiffs were only entitled to recover, upon *proving*, that James C. Gleaton died insolvent, and that the property conveyed to defendant was necessary to pay his debts. This the Court declined to charge, but stated that it was proven, that the mare was in her possession, and directed the jury to find for plaintiffs the amount of their debt, that not exceeding the value of the mare. The jury so found, and counsel for defendant excepted.

P. J. STROZIER, for plaintiff in error.

THOMAS H. DAWSON, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

The deed of gift was made by the deceased, to the plaintiff in error, on the same evening, (or the evening preceding,) of his death. It was a voluntary conveyance. The deceased died at the house of the plaintiff in error, and the mare remained in her possession. The deed, though binding on James C. Gleaton and his heirs, executors, and administrators, was void as to his creditors. If there had been a rightful executor, he could not have claimed the property, for the deed was good and binding on the donor and his representatives, but the donee by receiving and using the property became executrix in her own wrong. There may be a rightful and an executor *de son tort* of the same person. *Bae. Al. executors and adm. B. 3. Dorsey vs. Smithson, 6 Har. & John. 61.*

Judgment affirmed.

MASON & DICKINSON, plaintiffs in error, vs. **WILLIAM W. CROOM**, defendant in error.

WILLIAM W. CROOM, plaintiff in error, vs. **MASON & DICKINSON**, defendants in error.

- [1.] A main issue in the trial of which the merits of the principal cause depends, is not a collateral issue, and the party cast is entitled to an appeal on complying with the terms imposed by the statute.
- [2.] The party on whom the burden of proof rests has the right to open and conclude the cause before the jury.
- [3.] Defendants' plea must be a full answer to the plaintiff's case, so far as he intends to answer to it.
- [4.] The sayings of an agent are not admissible against his principal, except as they form a part of the transaction, or *res gestæ*.
- [5.] When a plea of tender is filed, the defendant should bring the thing tendered into Court, or aver his readiness to do it.

Foreclosure, and new trial, from Bakercountry. Decision by Judge ALLEN, November Term, 1857.

This was an application to foreclose a mortgage which had been executed by Mason & Dickinson to William W. Croom, to secure the payment of two notes made by them to him. When the *rule nisi* which had been granted came on for hearing, the defendants showed, for cause why the same should not be made absolute, that the mortgage deed had been executed by them upon the distinct promise on the part of Richard Hobbs, one of the firm of Hines & Hobbs, plaintiff's attorneys, that the same should be cancelled when they should turn over to the said Hines & Hobbs, collaterals on solvent persons, sufficient to pay off the notes; that they had paid the said Hines & Hobbs part of the amount due on the said mortgage debt, and tendered to them the amount of the balance in collaterals; but that Hines & Hobbs refused to accept the same, alleging that they were not good and collectable. The jury returned a verdict for the defendants, and the plaintiff carried the case to the appeal.

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The defendants, when the case came on to be heard, moved the Court to dismiss the appeal, on the grounds, that the issue found in said cause was a collateral one, and that no appeal could be taken from the verdict rendered in the cause. The Court overruled the motion, and permitted the cause to proceed, and the defendants excepted.

Plaintiff's counsel then offered in evidence the mortgage, the notes it was given to secure,, the *rule nisi* to foreclose, and closed.

The defendants' counsel introduced *William E. Smith*, who stated, that Richard Hobbs had told him that they would deliver up to the defendants the mortgage, whenever defendants turned over to them collaterals in its place, sufficient to secure the debt; that Dickinson, one of the firm, had tendered them collaterals, but that they had refused them, as they could foreclose the mortgage and realize the money sooner that way, than they could by suing the collaterals tendered.

Defendants' counsel claimed the right to open and conclude, under the 55th common law rule, and moved the Court to give them that privilege. The Court overruled the motion, and allowed counsel for the plaintiff to open and conclude, and defendants' counsel excepted.

The jury found for the plaintiff.

Defendants' counsel moved for a new trial, on the following grounds:

1st. Because the Court erred in not dismissing the appeal, on the ground that the issue was a collateral one, and no appeal could be taken from the verdict rendered thereon.

2d. Because the Court erred in ruling, that counsel for defendants, on the trial of said issue, were not entitled to the opening and conclusion before the jury.

3d. Because the jury found contrary to the charge of the Court, in this, that if they should be satisfied from the evidence, that there was an agreement between plaintiff, by his attorneys, Hines & Hobbs, or either of them, and defendants, at the execution of said mortgage, that said mortgage should be given up whenever defendants should give them good collateral notes for security of the debts covered by said mortgage, to the amount of said debt, and that said defendants had complied with their part of said agreement, by giving said collaterals, or offering to do so within a reasonable time, that then they must find for defendants.

4th. Because the finding of the jury was contrary to evidence.

5th. Because the finding was contrary to law.

On hearing the motion, the Court sustained the same, and awarded a new trial on the 4th ground taken, but overruled the same on the first two grounds taken in the *rule nisi*.

Defendants' counsel then filed their bill of exceptions, alleging that the Court erred in not awarding a new trial on the first two grounds taken in the motion for a new trial, and also, that the Court erred in not dismissing said appeal, before the cause was submitted to the jury.

Plaintiff's counsel moved to strike out the plea which had been entered by the defendants, as insufficient and illegal. This motion was refused by the Court, and the plaintiff excepted.

Plaintiff's counsel also objected to the testimony of William E. Smith, offered in evidence by the defendants. This objection the Court overruled, and the plaintiff's counsel excepted.

The defendants offered in evidence certain receipts given by the said Hines & Hobbs, for sundry claims placed in their hands by the said Mason & Dickinson, to go in payment of

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their debt to Croom. To the admission of these in evidence, plaintiff's counsel objected. The Court overruled the objection, and plaintiff's counsel excepted.

Plaintiff's counsel then offered to receive good notes in payment of the balance due on the mortgage, and moved the Court that such offer might be accepted. The Court overruled the motion, and plaintiff's counsel excepted.

Plaintiff's counsel then offered to place Richard Hobbs on the stand, to prove the contract made with Mason & Dickinson. The Court held that such evidence would be illegal; the said Hobbs being the attorney of the said plaintiff.

The Court charged the jury, that if they believed that there was a contract made between the said Croom or his attorneys, to satisfy and cancel said mortgage upon the delivery to them of good collateral notes to the amount of the debt, then, that if they had tendered good notes to said Hines & Hobbs, they should find for the defendant. To this charge the counsel for the plaintiff excepted.

The jury returned a verdict for the plaintiff.

The defendant then moved for and obtained a new trial on the ground above stated.

To all the above rulings of the Court, and also to the charge so given to the jury, the counsel for the plaintiff excepted, and filed his bill of exceptions, assigning the same as error.

LYON & IRWIN, for Mason & Dickinson.

HINES & HOBBS, *contra*.

By the Court.—McDONALD J., delivering the opinion.

Both parties except to the decision of the Court below on the motion for a new trial. The Court granted a new trial

on the ground that the verdict of the jury (which was for the plaintiff,) was contrary to evidence.

The defendant's counsel having moved to dismiss the appeal entered by the plaintiff in the cause, on the ground, that the issue tried by the jury was a collateral issue, and no appeal could be taken from a verdict rendered on such issue, and the Court having refused the motion, the refusal of the motion was made a ground for the new trial.

After the evidence was closed, defendant's counsel insisted, that he was entitled to open and conclude the argument of the cause before the jury. The Court ruled otherwise, and this ruling of the Court was also incorporated amongst the grounds taken in the motion for a new trial. The Court below overruled both grounds.

[1.] The issue in this cause was not ordered by the Court to try a matter collateral to the main issue, and necessary to be determined before the trial of said main issue could proceed; but it was an issue which involved the plaintiff's right to recover, and was a principal issue. In all such cases, the party dissatisfied with the verdict of the jury may appeal, as a matter of right, upon complying with the terms imposed by the statute.

[2.] In regard to the right to open and conclude the argument before the jury, we will simply remark, that the burden of proof lay on the plaintiff, to prove his mortgage debt, as well as all matters preliminary to his right to have judgment of foreclosure, and the burden of proof thus resting upon him, he had the right to make the concluding argument to the jury. On the bill of exceptions, therefore, of the defendants in the Court below, we affirm the judgment of that Court.

The plaintiff brings up the same cause, and assigns error on the rulings and decisions of the Court during the progress of the trial.

[3.] The plaintiff's counsel moved to strike out the defendants' pleas. The first plea set out a special contract be-

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tween mortgagor and agent of mortgagee, that the mortgage was to be given up and cancelled, whenever the defendants should turn over to plaintiff's attorneys a sufficient amount of collaterals or notes which were solvent and collectable, to pay off and discharge the amount of the indebtedness of the firm of Mason & Dickinson to the plaintiff. The plea avers, that they paid to plaintiff's attorneys, in cash or its equivalent, the sum of five hundred and ten dollars, and delivered also, in good collectable collaterals, the sum of nine hundred dollars or thereabouts, and tendered to them the full amount of the balance due on said mortgage debt in collaterals; and on their refusing to accept the same, in compliance with said agreement, the defendants offered and tendered the one-half of the balance due on said debt, after deducting the five hundred and ten dollars in cash, and the nine hundred dollars in collaterals so paid and delivered before that time—in cash and deliver the remainder in collaterals, provided the said plaintiff's attorneys would cancel and deliver up said mortgage, according to the agreement. It was objected to this plea, that it is not averred that the collaterals which were tendered were on solvent persons and collectable, and that they are not brought into Court and tendered in the plea. The Court below overruled the objection. It was the contract, that the collaterals or notes were to be solvent and collectable, and the plea must show that the collaterals tendered were of the description bargained to be received; if they were not, the plaintiff was under no obligation to receive them. (The plea ought at least to have averred an offer to deliver them in Court.) In these respects the plea is defective, and ought to have been stricken out.

[4.] The sayings of Hobbs ought not to have been received against the plaintiff, except when engaged in the performance or execution of the duties of his agency. The sayings of an agent, except as it forms a part of a transaction, are not admissible against his principal. They are then received as

auxiliaries in construing the act, and arriving at the purpose, object, and intent of the parties.

[5.] The Court ought to have charged the jury, that the defendant should have pleaded that the collaterals or notes solvent and collectable, were tendered to the plaintiff; and if he refused to receive them, that they had brought them into Court or were ready to bring them, to be delivered to the plaintiff in discharge of their contract.

The plaintiff was entitled to the security which was to be substituted for the mortgage, before he could be compelled to relinquish the security he had.

A tender bars the action, but not the right; and upon being pleaded, and proof of it being made by the defendant on the trial, the plaintiff would be compelled to pay the costs, provided he did at Court what he had offered to do, and which the plaintiff had refused, and that amounted to a compliance with his undertaking in all respects.

We overrule the other points made by the plaintiff in error in this case. We reverse the judgment of the Court upon the points indicated, but inasmuch as it might further the ends of justice to allow the case to be re-tried, we so order.

Judgment reversed.

BENJAMIN O. KEATON, plaintiff in error, vs. **LEWIS S. McGWIER**, adm'r of **E. M. M. GREENWOOD**, dec'd, defendant in error.

[1.] Where the husband has been examined in a case, the wife is not admissible to discredit him, by proving facts, a knowledge of which she acquired by reason of the marriage relation.—**BENNING J.** hesitating.

[2.] The mere failure of a defendant, to answer an allegation in the bill, does

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not amount to an admission of the allegation, and make it evidence against him.

- [3.] Although it may be, that the trustee disavows the trust, yet if he has an undue influence over the *cestui que trust*, the statute of limitations does not begin to run in his favor, until the cessation of that influence.
- [4.] The complainant cannot avail himself of matter not contained in the bill, or in the answer, although it may be contained in the evidence.
- [5.] A receipt in full given by the *cestui que trust* to the trustee, is *prima facie* evidence of a settlement in full between them; and consequently, casts on the former, the burden of proving, that the settlement was not in full.
- [6.] Statutes of limitation obtain in a Court of Equity; and, to the extent to which they obtain there, they *bind* the Court.

In Equity, from Dougherty county. Tried before Judge ALLEN, at June Term, 1857.

The bill in this case, was originally filed by Elizabeth M. M. Greenwood, against Benjamin O. Keaton, for an account, discovery, relief, &c. Upon the death of Mrs. Greenwood, Lewis S. McGwier, was appointed her administrator and made the party complainant, and in his name the cause proceeded and came upon trial at the June Term, 1857.

The opinion pronounced by the Supreme Court will be fully understood from the bill of exceptions, which is as follows:

GEORGIA, DOUGHERTY COUNTY.

Be it remembered, That during the regular June Term, 1857, of the Superior Court of said county, his Honor ALEXANDER A. ALLEN, one of the Judges of the Superior Courts of said State, presiding; the cause of Lewis S. McGwier, administrator of the estate of Elizabeth M. M. Greenwood vs. Benjamin O. Keaton, being a bill for discovery, relief and account, filed by the said Elizabeth M. M. in her lifetime, came on to be heard upon the pleadings and evidence in said cause, and the parties having announced themselves ready for trial, counsel for the respondent moved the Court to have Lindsay H. Durham and Ambrose Wright, two of

the grand jurors in attendance and sworn, brought into Court for the purpose of placing them upon their *voir dire* to ascertain if they were liable to challenge for cause. The Court granted the motion, and the said Jurors were each placed upon his *voir dire*, and asked whether he had formed and expressed an opinion as to which party ought to prevail in the cause. The juror, Lindsay H. Durham, answered in the affirmative, and that his opinion was formed from having read the decision of the Supreme Court when the case was before it on demurrer; he farther stated that the opinion was still on his mind. On cross examination, he stated that if he were selected as a juror, he would be governed by the evidence alone, and not by the opinion. Counsel for defendant moved the Court to reject said juror for cause. The Court overruled the motion, and pronounced said Lindsay H. Durham a competent Juror, and counsel for defendant excepted. (*Waived.*)

The Juror, Ambrose Wright, in response to the question propounded, stated that he had formed and expressed an opinion as to which party ought to prevail in the case; that the opinion so formed and expressed was still on his mind. On cross examination he stated that if selected to try the cause, he would be governed alone by the evidence, and not by the opinion. Counsel for defendant moved the Court to reject said Juror for cause; the Court overruled the motion, and pronounced him competent. Both of said jurors were stricken by defendant's counsel. (*Waived.*)

The jury having been regularly empaneled to try said cause, complainant's counsel offered in evidence the depositions of Armijah Hall, taken by commission *de bene esse*. Counsel for defendant objected to the fourth cross interrogatory propounded to said witness, as follows: "What were defendant's circumstances at the time of receiving complainant's effects into his hands? How much land and negroes had he? What amount of money had he? Was he or not at the time a moneyed man, or known and regarded as such?

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Was he a note-shaver, money-lender, or speculator in lands?" The Court overruled the objection and allowed the answer to said interrogatory to go in evidence, and counsel for defendant excepted. (*Waived.*)

Counsel for defendant objected to the fifth cross interrogatory propounded to said witness, as follows: "At what rate was defendant in the habit of lending money and in shaving notes?" The Court overruled the objection, allowed the answer to said interrogatory to be read in evidence, and counsel for defendant excepted. (*Waived.*)

Counsel for complainant next offered in evidence the depositions of James Jeffries, taken by commission *de bene esse* upon the application of defendant. Counsel for defendant objected to the sixth cross interrogatory propounded to said witness and the answer thereto. The interrogatory was as follows: "What sort of speculations and operations did he (defendant) engage in immediately after receiving these funds of complainant, and how much has he increased his property since that time?" The Court overruled the objection, permitted the answer to the interrogatory to be read, and counsel for defendant excepted. Counsel for defendant excepted to the answer of said witness to the eleventh interrogatory, on the ground that witness gave his opinion without stating the grounds of said opinion. The Court overruled the objection and permitted the answer to be read, and counsel for defendant excepted.

Counsel for complainant then offered in evidence, a deed from Benjamin O. Keaton, defendant, to Elizabeth M. M. Greenwood, complainant, bearing date the 12th day of September, 1839, and certificate endorsed thereon of 2d day of November, 1844. (*Waived.*)

Counsel for complainant then offered in evidence an exemplification of an action for criminal conversation brought by Benj. L. Greenwood against defendant, in Baker Superior Court, and filed in office 14th November, 1838. Counsel for

defendant objected to said exemplification going in evidence, because irrelevant. The Court overruled the objection, and counsel for defendant excepted. (*Waived.*)

Counsel for complainant next offered in evidence a certified copy of a deed purporting to have been executed by defendant to Hartwell H. Tarver, for lot of land number one hundred and forty-two, (142,) in the second district of originally Early county. Counsel for defendant objected to said copy deed going in evidence, because the original was better evidence. Complainant then introduced Paul E. Tarver and William Tarver, executors of the last will and testament of Hartwell Tarver, who testified that the original was not in the possession of either of them, but that it was in the possession of Alfred H. Colquitt, the present owner of said lot of land. Paul E. Tarver had been served with subpoena *duces tecum* to produce said original deed; had a conversation with complainant and counsel and did not disclose that he did not have the deed before service of subpoena. The Court overruled objection of defendant's counsel, and permitted the copy deed to go in evidence, and counsel for defendant excepted. (*Waived.*)

The complainant's counsel introduced other testimony, a copy of which is heretofore appended and incorporated in the brief of testimony:

1st. Complainant's counsel having closed their case, counsel for defendant introduced John A. Davis, David A. Vason, Thomas C. Spicer and James J. Mayo, whose evidence is hereto appended and incorporated in the brief of oral testimony. Counsel for defendant also offered in evidence the depositions of Franklin Beck, which were read to the jury. Counsel for defendant then offered to read in evidence the answers of Mrs. — Jeffries, to interrogatories sued out in this cause. Counsel for complainant objected to said answers being read, on the ground that the witness was the wife of James Jeffries, now deceased, and that the object of

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the testimony was to discredit him. The Court, on examination of the answers, sustained the objection and ruled out all and every part of the answers, holding that the facts stated were derived by the witness from the confidential relation of husband and wife, and counsel for defendant excepted. A copy of the answers are hereto appended and incorporated in the brief of testimony.

Counsel for defendant then offered in evidence various receipts—one for seven thousand five hundred dollars, dated 12th September, 1839; one for one thousand two hundred and fifty dollars for lot of land sold to Hartwell H. Tarver, 2d November, 1844; one 12th day of September, 1839, for three hundred and fifteen dollars for note on Thomas Hall—certificate 1st day of October, 1849, and a mortgage bearing date 14th day of July 1840, on a negro woman Martha, to secure note for seven hundred dollars; also, a promissory note on Thomas Hall for one thousand six hundred and sixty-one dollars and forty-two cents, dated 11th May, 1841, and secured mortgage on real estate, copies of all which are hereto appended and incorporated in the brief of testimony.

Counsel for defendant then read in evidence the depositions of Hartwell H. Tarver to interrogatories, and introduced as witness for defendant, Thomas P. Smith and Drury W. Ledbetter, whose evidence is stated in brief of oral testimony.

2d. Counsel for defendant then closed; and the case being closed on both sides, the Court charged the jury that the bill and answer in equity causes, served the purpose of both pleading and evidence, and that the allegations of the bill not denied by the answer were to be taken as true; to which charge counsel for defendant excepted.

Charges given on the request of Keaton's counsel.

3d. Counsel for defendant requested the Court in writing to charge the jury, that when the *cestui que trust* is under no legal disability, and competent to act for himself, and is him-

self the party creating or conferring the trust, he is competent to release or discharge the trust. And if such a *cestui que trust* execute a receipt in full, it is evidence of a settlement, and the burden of showing such settlement to have been produced by fraud or undue influence, is upon the party attacking it. The Court so charged, but qualified said charge to the jury, that before a receipt so given could shift the burden of proof, it must appear to have been given on a full and fair settlement, if suspicion have attached to the transaction; to which charge and refusal to charge, counsel for defendant excepted.

4th. Counsel for defendant farther requested the Court in writing to charge the jury, that if the defendant in his answer denied receiving the money, notes and cotton upon the trusts charged in complainant's bill, such denial was responsive to the bill, and was evidence for the defendant equal to the testimony of two witnesses or one witness with corroborating circumstances. The Court so charged, but qualified said charge as requested, and charged the jury that such denial was responsive to the bill, and to be taken as evidence in the manner stated, unless the trust was admitted in other portions of the answer; to which charge and refusal to charge, counsel for defendant excepted.

5th. Counsel for defendant requested the Court in writing to charge the jury, that though the relation of trustee and *cestui que trust* may have existed between the parties, yet if the jury believed from the evidence that the defendant had disavowed the trust from September, 1839, and denied owing complainant any thing, and she had knowledge of such denial, it is a good bar in equity to her right of recovery, on the ground of lapse of time. The Court so charged, and by way of qualification of said request, charged that the disavowal in September 1839, must have been upon a full and fair settlement to constitute a starting point for the securing of the statute of limitations; to which charge and refusal to charge, counsel for defendant excepted.

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6th. Counsel for defendant farther requested the Court in writing to charge the jury, that complainant having by her bill repudiated the deed executed by defendant to complainant in 1839, and alleged in her bill that said deed was made for a purpose foreign to the alleged trust; she is concluded by her pleadings from relying upon said deed as a continuation of said alleged trust. The Court refused to charge, and counsel for defendant excepted.

7th. Counsel for defendant farther requested the Court in writing to charge the jury, that if they believed from the evidence that the deed of defendant to complainant was made for the purpose, (and so stated by the parties, of a settlement of the original trust, said deed cannot be relied upon as a continuation of said original trust. The Court refused so to charge, and counsel for defendant excepted.

8th. Counsel for defendant farther requested the Court in writing, to charge the jury, that if they believed from the evidence, that complainant received from defendant the proceeds of Lot No. 142, in the second district, sold to Hartwell H. Tarver in 1844, and dealt with the other lands subsequent to that time, as her own, such acts amount to a recognition and ratification by her of the settlement made in 1839, and throws the burden upon complainant of showing that in so doing she acted in ignorance of her rights. The Court refused so to charge, and counsel for defendant excepted.

Charges given on the request of McGwier's counsel.

9. Counsel for complainant requested the Court in writing, to charge the Jury, that if they were satisfied the relation of trustee existed at first between the parties, and were also satisfied that when the deed was made in September 1839 and the receipt then taken, it was not intended as a settlement, and was not an actual settlement between the parties of the original fund, then so far as these acts are concerned they do not disturb or bring to a close that relation. Which charge

the Court gave as requested, and counsel for defendant excepted.

10th. Counsel for complainant farther requested the Court in writing to charge the Jury, that if they believed said deed and receipt in Sept. 1839 were intended as a settlement in any respect and to any extent, and that the relation of trustee and *cestui que trust* was then existing and that the amount then due by Keaton of the trust fund, was \$7,500, and that there was any fraud, concealment or advantage taken by Keaton in his character as trustee, the Jury may disregard and set aside said settlement. Which charge the Court gave as requested, and counsel for defendant excepted.

11th. The Court farther charged the Jury as a proposition applicable to this case, that in settlements between trustee and *cestui que trust* which are attacked or impeached for fraud, or not being a *bona fide* settlement, the weight is upon the trustee to show the fairness of the settlement. To which charge counsel for defendant excepted.

12th. Counsel for complainant requested the Court to charge the jury, that if they believed that the settlement as contained in the deed was not a *bona fide* settlement, but was nevertheless intended by Keaton and not by Mrs. Greenwood to represent the original trust fund, and that Keaton went on and undertook and did sell any part of said lands as Mrs. Greenwood's agent, and as he would sell, would by himself or by his directions, have the numbers so sold stricken from the deed, that these acts continued and kept in existence the original trust. Which charge the Court gave as requested, and counsel for defendant excepted.

13th. Counsel for complainant farther requested the Court to charge the jury, that if they believed when the receipt on the back of the deed of November 1844 was given by Mrs. Greenwood, that it relates entirely to the money for the sale of the lands, that such a receipt does not end the trust, and what the proof shows the land brought and was by Keaton paid over to Mrs. Greenwood he is entitled to a credit for on

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the trust fund. Which charge the Court gave as requested, and counsel for defendant excepted.

14th. Counsel for complainant farther requested the Court to charge the jury, that if they believed the relation of trustee and *cestui que trust* existed at the making of the deed in September, 1839, and that the trust fund then held by Keaton for Mrs. Greenwood amounted to \$7,500, and if the jury believe, from the answer of defendant setting forth his acts touching said deed from first to last that, at the time he first made it, he intended it only as a security for the trust fund, then the jury may regard said deed as written evidence under seal of the trust. Which said charge the Court gave as requested, and counsel for defendant excepted.

15th. Counsel for complainant farther requested the Court to charge the jury, that in Courts of Equity statutes of limitation do not obtain, but it is in the discretion of a Court of Equity to act by analogy and apply the same statutory bar that would exist in a Court of law, that how this discretion is to be exercised must depend upon the circumstances of each particular case, and these circumstances are mainly the nature of the transaction, the time that has elapsed if unnecessarily long, and the impossibilities to get evidence from the lapse of time. Which charge the Court gave as requested, adding at the conclusion of said charge, the words "as already charged"—[See charge as incorporated in grounds for new trial]—and counsel for defendant excepted.

16th. The Court farther charged the jury as requested by complainant's counsel, that if they believed from the evidence that the trust once existed and that any portion of the trust fund was still in the hands of defendant at the time of filing said bill, or within four years of the filing of the same, that the original trust still exists, and is not barred by the statute of limitation—that it matters not in what shape the fund may exist, whether money or land, it is the same, if the proceeds of the original trust fund. To which charge as given, counsel for defendant excepted.

17th. The Court farther charged the jury as requested by counsel for complainant, that if they believed from the evidence that the trust continued after the deed and receipt of 1839, then the receipt on the back of the deed does not constitute a point at which the statute of limitations will begin to run against the original trust, as defendant only pleads it as a bar to the investigation concerning the sales of lands. To which charge as given, counsel for defendant excepted.

18th. The Court farther charged the jury as requested by complainants counsel, that if they believed the deed to the lands was made merely to secure the trust fund, or to deceive the public, and was in fact not a settlement, or if they believe the value of the lands was grossly overrated by defendant to complainant, and that she was induced to accept them as a settlement by her confidence in him and his power over her, and that he did not deal fairly and *bona fide* with her, then it was not such a settlement as will protect the defendant under the statute of limitations. To which charge as given, counsel for defendant excepted.

19th. The jury returned a verdict for complainant; whereupon, counsel for defendant, during the said term and before the adjournment thereof, moved for a new trial in said cause, on the grounds of error in the several rulings and decisions of the Court as aforesaid, and upon the additional grounds that the jury found contrary to equity and contrary to evidence; which motion was overruled by the Court, and counsel for defendant excepted.

And counsel for defendant, on this the 19th day of June, 1857, being within thirty days from the adjournment of the said term of said Court, tenders his bill of exceptions, and says that the Court erred in the several rulings and decisions aforesaid.

And as the facts aforesaid do not appear of record, the defendant by his counsel prays that his bill of exceptions may

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be signed and certified as required by the statute in such cases made and provided.

WARREN & WARREN; P. J. STROZIER and W. M. SLAUGHTER, for plaintiff in error.

LYON & CLARKE; and VASON & DAVIS, *contra*.

By the Court.—BENNING, J. delivering the opinion.

Was the testimony of Mrs. Jeffries admissible? The Court below held that it was not.

The testimony of Mr. Jeffries, her husband, had been read by the complainant; and the only effect the testimony of Mrs. Jeffries, offered by the defendant, could have had, would have been, to discredit Mr. Jeffries.

[1.] This being so, the testimony of Mrs. Jeffries, was, according to *Rex vs. Cloviger*, (2 T. R. 263;) and *Stein vs. Bowman et al.* (13 Pet. 218,) not admissible. This Court will follow these cases, and affirm the judgment of the Court below; but I must say, that it will do this, so far as I am concerned, with extreme reluctance and dissatisfaction. See *Rex vs. Bathwick*, (2 B. & Ad. 630, 647;) *Rex vs. All Saints*, (6 M. & S. 194;) 1 Green. Ev. § 342, § 254, and cases cited. I am, still open to argument on the point.

The Court told the jury, "that the allegations of the bill, not denied by the answer, were to be taken as true."

In this, the Court, we think, was wrong,—even if there had been no answer at all, and the bill had been taken as confessed, the plaintiff would not have had the right to use the bill as evidence, until he had filed his own affidavit "of what, he" might "know or believe, the defendant could, or ought to answer." 1 Eq. Rule, 2 Kel. 481. It cannot be, that the defendant injures his condition in this respect, by putting in an answer, and one so full, that it is not excepted to.

The Judiciary Act of 1799, seems to contemplate, that

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“the facts in the” “bill,” have to be “taken *pro confesso*,” before they can be used as evidence, in obtaining a decree. *Pr. Dig.* 447.

I do not know of any English authority, that goes further than this, that if a defendant answers, that he *believes* a statement in the bill to be true, the Court will treat the statement as true. And there is other authority saying, that even this is going too far. *Potter vs. Potter*, 3 *Atk*, 719; *Hill vs. Binney*, 6 *Ves.* 738; *Hood vs. Pymm*, 4 *Sim.* 101. In this last case, the bill alleged a will; the answer was silent as to this allegation; at the hearing, no proof of the will was made; the Court, for the want of this proof, dismissed the bill.

“A mere statement, however, in an answer, that a defendant has been informed, that a fact is as stated, without an answer as to his belief concerning it, will not be such an admission as can be read as evidence of the fact.” 2 *Danl. Ch. Pr.* 402.

It seems that there are some American cases that recognize a different rule. What authority they have for doing so, I am not aware of. 3 *Green Ev.* § 276, and cases cited.

[2.] We think, that this charge was erroneous.

Charges given on the requests of Keaton's counsel.

It is not perfectly clear, what the Court meant, by the qualification it gave to the first of these requests. We think the whole charge would have been better, if it had been something to this effect; that a receipt in full given by even a *cestui que trust*, to his trustee, is *prima facie* evidence of a settlement between them, and throws on the *cestui que trust*, the burden of showing the receipt to have been obtained by fraud, by undue influence, (a thing easily growing out of such a relation as that of trustee and *cestui que trust*,) or to have been obtained in some other improper way; but that, when the case is one brought by a *cestui que trust* against a trustee, less evidence is needed to show the receipt to have been

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thus obtained, than is needed, when the case is one between persons not occupying toward each other, such a relation.

If a receipt in full is not sufficient to cast the onus, it is a thing not worth taking; for that is the least effect it can have. And to say that a receipt in full, when given by a *cestui que trust* to his trustee, is to have *no* effect, is to say that the former is not *competent* to give to the latter such a receipt.

The qualification given to the second of these requests, was, no doubt, right, if the facts were such as to authorize it.

The Counsel for McGwier insist, that certain parts of the answer, by implication, admit the trust as alleged in the bill; especially the part of the answer in which Keaton says, to her, that if "he took the notes on condition that he would manage them for her, it would not change their relations," &c. This the counsel for Keaton, deny. The issue is one, that may be settled by an amendment to the answer, stating more fully what the defendant meant by these expressions.

I doubt, myself, whether the expressions, as they stand, are susceptible of the construction put upon them, by McGwier's counsel. If the evidence of Jeffries is true, the talk between Keaton and Mrs. Greenwood, about these notes, was intended by secret preconcert, for a very different purpose.

The qualification to the third of these requests, was, we think, erroneous.

It is, generally, true, that if the trustee disavows the trust, and such disavowal is known to the *cestui que trust*, the statute of limitations begins to run in favor of the trustee. This principle applies, not only where there has been a "full and fair settlement"; but even where, there has been no settlement at all. It must apply, then, where there has been some settlement, even one not "full and fair."

[3.] An exception to the rule, is, where the *cestui que trust* labors under an undue influence proceeding from the trustee. A qualification of the request, to the following effect, would therefore, have been proper, viz: That if Keaton, at

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the time of such disavowal, had over Mrs. Greenwood, such an undue influence, that it operated to deter or prevent her, from asserting her rights against him, by suit, then the statute did not begin to run against her, until the cessation of that influence. *Percel vs. McNamara*, 14 *Ves.* 91; 9 *Ves.* 292; *Lady Ormand vs. Hutchinson*, 13 *Ves.* 47; *Wood vs. Downs*, 18 *Ves.* 120; *Taylor and others vs. Obee*, 3 *Price*, 83.

Something further on this point hereafter.

The fourth of these requests, was, "that complainant by her bill, having repudiated the deed executed by defendant to complainant in 1839, and alleged in her bill, that said deed was made for a purpose foreign to the alleged trust; she is concluded by her pleadings from relying on said deed, as a continuation of said alleged trust." This request the Court refused.

There are allegations in the bill, which amount to this,—that the deed was made by Keaton to Mrs. Greenwood, exclusively to serve his own purpose, viz: to save the land contained in the deed, from the *crim. con.* suit of her husband against him, Keaton; and that she never accepted, or claimed, the land as her own.

These allegations are denied by the answer. They are not proved by any witness. A different thing from what they import, is proved by a witness, Jeffries. He proves, that "Keaton said to Mrs. Greenwood, that her husband had sued him, and he feared would ruin him, and he was anxious to secure her, in case he was ruined, and that he would turn over to her these lands, mentioned in the deed." This seems to be as much as to say, that the lands were turned over to Mrs. Greenwood, by Keaton, not to save them from the *crim. con.* suit, as *she* said they were; nor, to pay her, what he owed her, as *he* said they were; but, to secure her in what he owed her; she pleads one thing; he pleads another thing; the witness proves a third thing. This third thing is such, that it might be evidence of a continuation of the trust, if there was a trust.

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Now, the pleadings being such as they were, could she avail herself of this proof, and make this third thing, thought out of the record, a part of her case?

[4.] "It is not only necessary that the substance of the case made by each party, should be proved, but *it must be substantially the same case as that which he has stated upon the record*; for the Court will not allow a party to be taken by surprise by a case proved on the other side, different from that set up by him in the pleadings." 2 *Dan. Ch. Pr.* 419.

This position is, no doubt true; it is well supported by authorities. See *Lindsay vs. Lynch*, 2 *Sch. & Lef.* 1, and the other cases cited by *Daniel*.

Even if this third thing appeared in the *answer*, it would be doubtful whether the complainant could avail himself of it, without having first amended his bill by adopting the thing, as a part of his case. 2 *Dan'l Ch. Pr.* 419, 420; 1 *do.* 513; *Stor. Eq. Pl.* §§ 264, 394 *n.* 1; 1 *Russ.* 359; *Mit. Eq.* 39.

We think, then, that, as the bill stood, this fourth request was a proper one; and, therefore that the Court, in rejecting it, erred.

The bill, however, is amendable; and the complainant may adopt this third thing as a part of his case, if he chooses to do so.

We think, that the Court should have given in charge, the *fifth* of these requests. The proposition contained in it seems to me, to be self-evident.

It is not meant to be said, that the deed may not be used as evidence, on the question of fraud, or that of undue influence, in what took place at the time when the deed was made.

The *sixth* of these requests required, as we think, modification—a modification which would have made it, substantially as follows; that if Mrs. Greenwood received from Keaton, the proceeds of the sale of lot No. 142, sold to Farver in 1844, and subsequently to that time, dealt with the other lands as her own; these acts, if they were done freely, and

not in consequence of an undue influence proceeding from Keaton, were acts in recognition, and ratification, of the settlement made in 1839; and, therefore, were acts which cast upon her, the burden of showing something to annul this effect of theirs; as, that they were done by her in ignorance of her rights, or through some mistake; or by the fraud of Keaton.

Whether there was undue influence, ignorance, mistake, fraud, or any thing else, to neutralize these acts, were questions for the jury. But the acts, if left without neutralization, were such, that they amounted to a recognition and ratification of the receipt of 1839, as a settlement, by Mrs. Greenwood. This I think, must be clear. The pleadings being as they are, how else are acts treating the land as her own to be accounted for? If the bill had said, (in accordance with Jeffries' testimony,) that the object of the deed of 1839, was, to secure Mrs. Greenwood, the case might be different.

Charges given on the requests of McGwier's counsel.

The propositions contained in the *first* and *second* of these requests, seem to us, to be true. These propositions were not denied before us by Keaton's counsel.

In connection with these propositions, (as it seems,) the Court told the jury, "that in settlements between trustee and *cestui que trust*, which are attacked, or impeached, for fraud, or, not being a *bona fide* settlement, the weight is upon the trustee, to show the fairness of the settlement."

We understand the Court to mean by, "*attacked or impeached*," attacked or impeached by *pleading*—by mere *allegations* in the bill—not attacked or impeached, by *proof*. See charge preceding any request. And taking this to be the meaning of the Court, we think, that the Court erred in this charge.

To say, that a receipt in full, given by the *cestui que trust* to the trustee, does not avail even to cast on the *cestui que*

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trust the burden of showing, that he did not receive all that he was entitled to, is to say, that such a receipt between such parties is *worthless*, is to encourage trustees to hold back the trust fund, until it is forced out of them by suit. (*Supra.*)

[5.] We think, that a receipt in full, given by a *cestui que trust* to his trustee, is *prima facie* evidence of a settlement in full between them; and, consequently, that such a receipt casts upon the *cestui que trust*, the burden of making some *proof*, that there was not a settlement in full between them.

Of course this must be taken, as referring to the case in which the *cestui que trust* acts freely and not under an undue influence of any sort, proceeding from the trustee.

The third of the complainant's requests was, as we think, not authorized by the *pleadings*. There is no statement in the bill, or in the answer, to the effect—"that the settlement as contained in the deed, was not a *bona fide* settlement, but was nevertheless intended by Keaton, and not, by Mrs. Greenwood, to represent the original trust fund." See above point, &c.

The fourth of these requests, when confined to the case made by the bill, was not amiss. That case was, that Mrs. Greenwood had entrusted \$8,000 to Keaton, to be managed by him for her, and, sometime afterwards, had taken from him a deed conveying to her some of his lands, not in payment of, or security for this sum, but to save the land from a *crim. con.* suit of her husband against him. Here was a trust, and one with which the deed had no connection. The receipt, (or rather certificate, perhaps,) was as follows:

"GEORGIA, BAKER COUNTY: This is to certify, that the within numbers in this deed that is marked out, has been sold by B. O. Keaton for me, and the proceeds turned over to me, by him, the said B. O. Keaton, this the 2d day of November, 1844.

E. M. M. GREENWOOD.

Test: JAMES JEFFRIES."

The date of the deed was the 12th of September, 1839. There does not seem to be anything in such a receipt, to cause the receipt itself, to end the trust, however much there may be in it, tending to show, that a thing other than the receipt, had *already* ended the trust, namely,—the deed.

The case made by the testimony of Jeffries, was different. According to that, the deed was made, to secure the payment of the trust funds to Mrs. Greenwood. The receipt shows, that Mrs. Greenwood got the money arising from the sale of a part of the lands contained in the deed. To the extent to which this money went—the trust was extinguished. According to *this* case, then, we may say, that the receipt *partially* ended the trust.

The fifth of these requests was erroneous, whether we take the case made by the bill, or the case made by the answer.

According to the bill, Keaton, (as well as Mrs. Greenwood,) intended the deed only as a means of saving his land from the *crim. con.* suit. According to the *bill*, then, it could not be true, that he “intended it, only as a security for the trust fund.”

According to the answer, the deed, together with a negro girl, and a gray mare, was given by Keaton to Mrs. Greenwood, and was accepted from him, by her, as “a full, fair, complete, final, and *bona fide* settlement of all monied transactions, debts of whatever kind, or nature; and a surrender of all fiduciary relations of whatever character or name, before that time existing; and that it was so understood by the complainant and defendant.”

It is true that, McGwier's counsel say, that a part of Keaton's answer admits, by implication, that there was *originally* a trust; but I am confident, that it cannot be said, that this, or any other part, of the answer, admits by implication, that a trust *continued to exist after the making of the deed*. This part of the answer has been referred to above.

According to the *answer*, then, it, equally, is not true, that

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Keaton "intended" the deed "only as a security for the trust fund." And even if there was, in the answer, but not in the bill, a statement to the effect, that Keaton intended the deed only as a security for the trust fund, it would be extremely doubtful, whether the complainant could avail himself of the statement. See point 4.

To make such a request as this proper, it will be necessary to amend the bill, by stating, that Keaton "intended" the deed "only as a security for the trust fund." See above point 4.

[6.] The sixth of these requests went, we think, too far. Statutes of limitation *do* obtain in a Court of Equity; and, to the extent to which they so obtain, a Court of Equity, has no discretion to dispense with them, but is *bound* by them. True, it is said, that a Court of Equity "acts by analogy," to these statutes. (1 *Stor. Eq. Jur.* § 64 a.) But this must mean, that a Court of Equity is *bound* so to act, whenever a proper case arises.

In a Court of Equity, however, these statutes are not allowed to extend to every case, to which they extend in a Court of Law. In a Court of Equity, they are not allowed to extend to cases of fraud whilst the fraud remains undiscovered; or, to cases in which, the injured party lives under an influence proceeding from the other party, which is so great as to be "undue." I do not know of any rule which defines, what is the amount of this influence, that it takes to make the influence undue. I suppose, however, that we may safely say this much, that if the amount is so great as to make the injured party rather forego exacting his rights, than, by exacting them, run the risk of displeasing the injuring party, the amount is undue. But a proposition of this sort is, if true, so difficult of application, that it can hardly be of much practical value.

The Court, we think, should not have granted this request in its full extent.

The seventh of these requests was too absolute.

Suppose it true, that there was a trust, and that Keaton still held "a portion of the trust fund," yet if it was also true, that he had held this portion for as much as four years next before the suit, adversely to Mrs. Greenwood, and had done so to her knowledge; that for the same period, his undue influence over her, (if he ever had any,) had ceased; that for the same period, the fraud, if any, by which he had obtained the fund, or managed to keep it, had been known to her,—then, still, the suit would be barred by the statute of limitations.

These qualifications should have been added to the charge, as we think.

As to the eighth of these requests.

The "receipt on the back of the deed," is "pleaded," without restriction as to the use to be made of it. The party pleading it, Keaton, may, therefore, put it to any use to which it may be adapted. Indeed the bill does not ask for any "investigation concerning the sales of the lands," contained in the deed. How then could it be true, that anything could be pleaded only in bar to such an investigation? Therefore there is nothing, *in the manner in which the receipt is pleaded*, to prevent it from being—"a point of time at which the statute of limitations" began to run in Keaton's favor.

It is no doubt true, that if the case was such as the *bill* makes it out to be, the receipt did "not constitute a point at which, the statute" began to run in Keaton's favor. According to the bill, the receipt was a thing that could not relate to the trust, for according to the bill, the lands were conveyed by the deed to Mrs. Greenwood, for a purpose quite different from any connected with the trust; and the receipt is merely as to the proceeds of the sales of some of the lands conveyed by the deed.

This charge, then, we think needed modification. It is not supported by the reason assigned for it.

As to the ninth and last of these requests:

First, there is nothing in the bill, or in the answer, to au-

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thorize the part of this request, in these words,—“if they believed the deed to the lands was made merely to secure the trust fund.”

Secondly: The rest of the charge was too absolute. It might properly have been to this effect—that if the settlement was to deceive the public, and thereby save Keaton’s lands from the *crim. con.* suit—was in fact not a settlement, then it was a thing that could not affect the operation of the statute of limitations, on the trust as stated by the bill; that even if the settlement was intended as a settlement, yet if it was procured by fraud, or by undue influence, in Keaton, the statute did not begin to run until the discovery of the fraud, or the cessation of the influence.

So much for the charges of the Court.

There was a motion for a new trial. The exceptions already considered, made a part of the grounds taken in that motion. Of the others of those grounds, all but two were abandoned. Of these two, one was, that the verdict was contrary to equity; the other, that the verdict was contrary to the evidence. The two may both be resolved into the last. And as to the last, we deem it inexpedient to express an opinion.

New trial granted.

PRISCILLA D. BUCKHOLTS, plaintiff in error, vs. PETER BUCKHOLTS, defendant in error.

[1.] The divorce law of 1850, not being retroactive, acts of cruel treatment, done before its passage, cannot be grounds of divorce under the law.

[2.] If, after an act of cruelty done by the husband to the wife, she lives with him for many years, and has by him numerous children, and would probably still live with him, but for the interference of a child, the act is condoned by her.

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[3.] A total divorce will not be granted on evidence consisting, *exclusively*, in confessions of the defendant.

Divorce, from Dooly. Tried before Judge POWERS, April Term, 1857. Motion for new trial granted Oct. Term, 1857

Priscilla D. Buckholts filed her petition against Peter Buckholts, her husband, praying for a divorce *a vinculo matrimonii*.

The petition states, that libelant was married to respondent in the year 1824, and from that time until within a recent period, they had lived together as man and wife, and had raised a large family of children—ten in number. That she had ever been a faithful, dutiful, and affectionate wife, but that for many years past, her husband had treated her with great cruelty and indignity, inflicting upon her inhuman and degrading beatings, and often threatening to kill her, whereby, she was put in great fear of life and limb, &c. That finally defendant, after beating petitioner, drove her from his house, and refused to allow her to remain and live with her children, and she was compelled to seek and find a home at her father's, in a distant county. That six of their children are minors and living with their father who, by reason of his habits and temperament, is unfit to rear and educate them.

By an amendment to her petition, libelant charges her husband with living in a state of incestuous adultery with his own sister.

Defendant pleaded, first, the general issue, denying the cruel treatment; second, condonation; third, that libelant's own turbulent temper and violent conduct had caused and rendered necessary the harsh treatment of which she complained

The jury found the following verdict:

"We the jury find that sufficient proofs have been referred to our consideration to authorize a total divorce; that is to say, a divorce *a vinculo matrimonii* upon legal princi-

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ples between the parties in this case; and we further set apart to Peter Buckholts, five thousand dollars out of the property, to be estimated and raised according to the order of the Court, and the balance of the property to the children of said parties."

Whereupon, counsel for respondent, Peter Buckholts, moved for a new trial, on the following grounds:

1st. Because said verdict is contrary to law and evidence.

2d. Because the verdict is decidedly and strongly against the weight of evidence.

3d. Because the distribution of the property is inequitable and unjust to defendant; the income and interest of five thousand dollars not being sufficient to maintain and support him at his advanced age of life, and said verdict makes no provision for the payment of his debts.

4th. Because the section of the Act which provides for and authorizes the distribution of defendant's estate, as made or proposed in said verdict, is contrary to the Constitution of the United States and the State of Georgia, in, that it takes private property without the consent of the owner and vests it in others, and inflicts a heavy forfeiture and penalty upon a citizen charged with, or convicted of, no crime or offense against the penal laws of the State.

5th. Because no act of cruelty on the part of defendant was proved which had not been condoned or forgiven; the last act proven having occurred nearly a year before the separation between the parties.

6th. Because the verdict is contrary to the charge of the Court, in this, that the Court charged that it was not every slight disagreement or fight between the parties, that will authorize a divorce.

7th. Because it was an abuse of the discretion vested in the jury to grant a total divorce, under the facts and circumstances of this case.

8th. Because, from the evidence, it appears that one of the children, William Buckholts, had an active agency in pre-

venting a reconciliation between the parties, and this fact should have operated as a bar to a total divorce, and should have increased the allowance made to defendant, out of his property.

9th. Because the articles of separation between the parties were a bar to a partial divorce even.

After argument, the presiding Judge set aside the verdict and ordered a new trial upon the grounds above stated.

Whereupon, counsel for libelant excepted.

WARREN & HUMPHRIES, represented by KILLEN & STUBBS, for plaintiff in error.

SAM. HALL; and JNO. M. GILES, *contra*.

By the Court.—BENNING, J. delivering the opinion.

The libel is put upon two grounds; cruel treatment, and incest.

In support of the last ground, no proof whatever, was offered.

The verdict was for the plaintiff, granting a total divorce, and disposing of the whole of the defendant's property, which was quite large.

The motion for a new trial was put on a number of grounds, and the judgment granting the motion, was itself put on all of those grounds.

The exception is to this judgment.

The judgment was right, if any of the grounds of the motion was good. The question, therefore is, were the grounds of the motion, or any of them, good?

The first ground was, that the verdict was contrary to law and evidence; the second, that it was decidedly and strongly against the weight of the evidence. These two may be treated as but one.

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There being no evidence, as to incest, the verdict may be considered as saying, that there was cruel treatment.

Does the evidence show, that there was cruel treatment? This then, is the question.

The evidence shows, that in 1828, the husband whipped the wife "with a cowhide without any provocation, only that she had invited several ladies to help her quilt the next day."

The evidence shows, that the husband confessed, that, eighteen or twenty years before the time of the taking of the evidence, "he kicked plaintiff on the jaw, and broke her jawbone."

A witness testified; that "at a church trial, some time in 1851 or 1852, when the dispute between plaintiff and defendant was investigated, defendant admitted before the church, that a short time before then, he had struck plaintiff, two or three licks with a negro whip, but he did not hurt her. He might have hurt her, if he had not been prevented. He complained of plaintiff's tongue, and said, she had told false things on him, but did not specify what. He said, he could not forgive her, or could not love her. From what witness understood, he wanted plaintiff to give a libel," [lie-bill?] "and refused to live with her unless she did. Plaintiff asked the church to forgive her, and begged defendant to forgive her, and let her live with him. The church expelled defendant." "Plaintiff afterwards lived with defendant for some time."

A witness says that he "heard plaintiff talking to his, witness's wife, after the church trial, and about a year before the separation. She was asked in relation to a rumor, that defendant had beaten her cruelly. She said it was not true: that he had hit her two or three licks with a whip, but had not hurt her. She said, the reports in circulation in regard to defendant's cruel treatment, were false. She, plaintiff, has been to the house of defendant, and staid all night there, since the suit was commenced."

The evidence shows, at the instance of mutual friends of the parties, overtures of reconciliation and re-cohabitation,

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were made by him to her, and that she, though seemingly inclined to accept them, had finally rejected them, being persuaded to do so, by one of the children, Wm. Buckholts, who, in his unfilial selfishness, "insisted, that the property should be settled on the children then, before he would agree for his mother to return."

The evidence shows, that there was a contract of separation, between the parties.

This is about the substance, of what the evidence shows. And is there in this any cruel treatment shown?

The acts shown in this, which are susceptible of being denominated acts of cruel treatment, are three—the whipping with the cowhide, the kick on the jaw, the licks with the negro whip.

The first of these acts, happened in 1828, twenty-seven years before the commencement of the suit, and twenty-two years before the existence of the law making cruel treatment, a contingent ground of total divorce. *Cobb Dig.* 226.

[1.] This law is not retroactive. Therefore, it could impart no divorce-supporting qualities to the cowhiding act, which that act did not possess before; and before, it possessed none, so far as a total divorce is concerned.

She continued to live with him after this act until 1852. and, while so living with him, she had by him a number of children. In 1852, (the time of the "church trial,") she wished still to live with him; she "begged" him, "to let her live with him." She even now, perhaps, would live with him, but for her son's objection.

[2.] This was *condonation* of the cowhiding. "When one of the married parties, knows the other to have committed a breach of matrimonial duty, yet continues or renews the cohabitation, the law presumes the offence is condoned." *Bish. Mar. and Div. sec's.* 357, 369.

This act of cowhiding could avail nothing, then, in making out the charge of cruel treatment.

[3.] The same things may be said of the second act of cruelty—the kick on the jaw; and also, this in addition, that the evidence in support of that act consists, exclusively, in the confessions of the defendant. And the law is, that when the evidence consists *exclusively* in such confessions, a total divorce will not be granted. *Bish. Mar. and Div. sec's 501, 305.*

There remains but the act of striking the licks with the negro whip, in 1852.

1. This act depends for its proof, exclusively, on the *confessions* of the parties.

2. It may be doubted, whether it was an act of *cruelty*; she said, the licks did not “hurt her;” she said, “the reports in circulation, in regard to defendant’s cruel treatment, were false.” She lived with him for a year after the act, and “begged” him “to let her” continue to “live with him;” which shows she had no *fear* of him. And may we not lay it down for law, that to make out a case of cruelty, “there must be either actual violence committed, attended with danger to life, limb or health, or there must be a reasonable apprehension of such violence. *Bish. Mar. and Div. sec. 454, note 1.*

3. There is enough in the evidence, to raise a suspicion, that she was not blameless. He complained of her “tongue,” “said, she had told false things on him, but did not specify what.” In her libel she charged him with *incest*; she offered no proof in support of the charge.

At the “church trial,” she “asked the church to forgive her, and begged defendant to forgive her and let her live with him.” *Bish. Mar. and Div. sec. 491.*

4. She *condoned* the act. She lived with him a year afterwards, She “begged” him to let her live with him longer. It is probable, she would live with him now, if her son would consent to it. She has slept at his house, even since the separation. And the condonation of this, the last act, prevented the revival of the two former acts, supposing that they were acts susceptible of revival.

Upon the whole, we think, that this third act was not sufficient to entitle the plaintiff to a total divorce.

The result must therefore, be, that, in our opinion, the verdict was contrary to the evidence; and consequently, that the two first grounds of the motion, were good. This makes it necessary, to affirm the judgment.

A word only, on some of the other grounds.

We cannot say, the we think the fourth ground good; or the ninth. It is needless to express an opinion on the rest. Indeed, they, for the most part, are involved in the first two, grounds, which have already been considered.

Judgment affirmed.

JOHN DOE, *ex dem.*, JOHN BUSH and ELIZA BUSH, plaintiffs in error, vs. RICHARD ROE, casual ejector, SHERWOOD C. LINDSEY, tenant in possession, defendants in error.

[1.] An exemplification of the proceedings of a Court of Ordinary, in appointing a guardian and ordering the sale of the ward's land, did not show upon its face any thing to give the Court jurisdiction, yet, *Held* that as the Court of Ordinary is a Court of general jurisdiction, it was to be presumed, that something existed by which the Court got jurisdiction, and, therefore, that the exemplification was admissible as evidence of such appointment and order.

[2.] A court house, with most of the records, was consumed by fire. The records left showed, among other things, an order authorizing S., as administrator of B., to sell a lot of land; the returns of S., as administrator of B.; and an order dismissing S. from the administration of the estate of B.

Held, That these things were sufficient to prove S. to have been appointed the administrator of the estate of B.

Ejectment, from Muscogee county. Tried before Judge Worrill, June Term, 1857.

This was an action of ejectment brought by the plaintiffs.

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in error, for the recovery of a lot of land No. 48, in the 8th district of Muscogee county.

On the trial, the plaintiffs introduced in evidence, a grant of the lot of land in question to Eliza Ann Hays, illegitimate, of Spink's district, Jones county, dated April 30th, 1834.

Plaintiffs also read in evidence the answers of Nancy Pate, to interrogatories, to the following effect: That she was the mother of Eliza Ann Bush, (the wife of William J. Bush,) who, at the time she gave in for the draw, was 3 weeks old, and that was the year before the land was drawn; that she lived in Jones county at the time the draw was given in for.

Plaintiffs then proved by the defendant, S. C. Lindsey, that he was in possession of the lot of land in question in 1847, and had continued so ever since; and introduced Wiley Williams, who proved that the drawing of the land took place in 1826 or 1827, and closed.

Defendant then offered to read in evidence the transcript of the record, certified by Marion Bethune, Clerk of the Court of Ordinary of Talbot county, in order to prove the appointment of Benjamin Pate as guardian of Eliza Ann Hays, illegitimate of Nancy Pate, as also an order of the Court of Ordinary, granting Benjamin Pate leave to sell the said lot of land.

To the reception of this exemplification plaintiff's counsel objected, on the ground that it did not appear that the Court of Ordinary of Talbot county had any jurisdiction to appoint the guardian; that it did not appear that the ward lived in that county, or that she had any property there; that it did not appear that it was the action of the Inferior Court of said county, sitting for ordinary purposes; that the transcript was not properly certified, there being no seal of the Court. And further, because it did affirmatively appear from the evidence of Nancy Pate, that she and child did live in Jones county at the time she gave in for the draw, and the law presumed

she still resided there. These objections were overruled by the Court and the transcript admitted as evidence.

Defendant then read in evidence a deed from Benjamin Pate to David J. Britt, to the lot of land in question, dated May 31st, 1834.

Defendant then offered in evidence a deed made by Charles D. Stewart, administrator of David J. Britt, to himself, for the said lot of land, dated April 2d, 1839, and for the purpose of proving that Stewart was such administrator, introduced as evidence John Johnson, who testified that he was Judge of Ordinary for the said County; that the court house with all the records was burnt down about 1838; that he had found no order appointing the said Stewart such administrator, but had found an order granting Stewart, as such administrator, leave to sell the lot in dispute, the returns of Stewart as such administrator, and an order dismissing Stewart from such administration, and these orders were read to the Court. Defendant then offered to read the deed in evidence, but plaintiffs objected, on the ground that it did not appear that Stewart had ever been appointed such administrator. This objection was overruled and the deed received in evidence, and to this plaintiffs excepted.

Plaintiffs, by his counsel, filed his bill of exceptions, alleging that the Court erred,

1st. In admitting in evidence the transcript of the record from Talbot Court.

2d. In admitting in evidence the deed from Stewart, as administrator to Lindsey.

INGRAM; and JOHNSON, for plaintiffs in error.

COOPER; and DOUGHERTY, *contra*.

By the Court.—BENNING, J. delivering the opinion.

Was the Court right in receiving as evidence the exempli-

fication from the Court of ordinary of Talbot county, showing the appointment of Pate as guardian of Hays, and an order authorizing him to sell the land?

The objection to the exemplification was, that it did not show upon its face, that the ward lived in Talbot County, or had property therein, at the time of the appointment or of the order, and, consequently, that it did not show upon its face, any thing to give jurisdiction to that Court, to make the appointment and pass the order.

It is sufficient if the Court had jurisdiction; it is not necessary that what gave it jurisdiction should appear on the face of its proceedings. The Court of Ordinary is, and has always been, a Court of general jurisdiction.

Mrs. Pate says, that she "lived in Jones county when the draw was given in for, the ward, her child, then being only three month old. In this, it is implied, that she had since ceased to live there, and had come to live elsewhere. There is nothing to show, that this other place was not Talbot county. It does not appear, that Pate, her husband, the person appointed the guardian, ever lived in Jones; it does not appear where he, at any time, lived. It may well be, therefore, that he and Mrs. Pate, and the child, were all living in Talbot county, at the time when his appointment of guardian was made, and at the time when the order of sale was passed.

[1.] But the Court being a Court of general jurisdiction, it is necessary to presume, in the absence of proof to the contrary, that, at these times, the ward did reside in Talbot county, or did have property in that county; in short, to presume, that something existed which gave the Court jurisdiction.

The Court, then, was right in receiving the exemplification.

[2.] We think, that the evidence was quite sufficient, to show that Stewart had been appointed the administrator of Britt's estate, and therefore, that the Court was right in allow-

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ing the deed made by Stewart, as such administrator, to go to the jury. The court-house having been burnt, it was fortunate, that the evidence left, was so much as it was.

Judgment affirmed.

EDWIN W. MOISE, receiver, plaintiff in error, vs. BRADFORD T. CHAPMAN, defendant in error.

[1.] The appointment of a receiver "does not at all affect the right."

[2.] By the fifteenth section of the Act of 1832, "to secure the solvency of all the banking institutions in this State," the paper discounted and held by a bank, is payable in the bills of the bank.

Complaint, from Muscogee. Tried before Judge WORRILL, November Term, 1857.

The Manufacturers and Mechanics Bank of Columbus having failed, Edwin W. Moise was appointed receiver, and among the papers and assets of the bank, found the following draft:

"\$1,000.

COLUMBUS, April 1st, 1856.

Forty-five days after date pay to my own order, one thousand dollars, at the office of Messrs. Lockett & Snelling, in Savannah, for value received.

[Signed]

A. W. CHAPMAN.

To Mr. B. T. Chapman, Sav., Ga."

[Written across the face,] "Accepted, B. T. CHAPMAN."

Moise sued Chapman on his acceptance; Chapman pleaded as a set-off the bills of the bank, which he had: some when the bank broke, some before suit, and some after suit brought.

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The case was submitted on the following agreed statement of facts:

That plaintiff is the receiver of the Manufacturers and Mechanics Bank, appointed by the Chancellor, under a creditor bill; that said bank, at the time it stopped payment, was the owner of and held the paper sued on; and that the same was at that time over due, and came into plaintiff's possession as receiver; that defendant, at and before trial, had the bills of the bank of which he is owner to an amount equal to the amount due on the draft sued on; two hundred dollars of the bills he had when the bank stopped payment, another hundred he got before suit, and the balance were obtained after suit, and all of which were pleaded as a tender and set-off, and were actually tendered in Court on the trial, but no tender was made before suit brought. That the bills bought since the commencement of the suit cost the defendant ten cents on the dollar.

It is further admitted, that of the bills last purchased, defendant had one hundred dollars, for which he agreed to give fifty cents in the dollar, if he could use them in payment in this case, otherwise he was to pay nothing for them. The draft was discounted at the Manufacturers and Mechanics Bank. The bank stopped payment Saturday, Nov. 2, 1856, and plaintiff was appointed receiver on the Monday following.

The Judge charged the jury, that upon the facts agreed upon, the plaintiff could only recover cost, defendant being entitled by the Act of 1832, to pay his draft in the bills of the bank; the jury found accordingly, and plaintiff excepted.

MOSES & MOISE; and DOUGHERTY, for plaintiff in error.

B. HILL; and THORNTON, *contra*.

By the Court.—BENNING, J. delivering the opinion.

The Court below told the jury, that the defendant was "entitled, by the Act of 1832, to pay his draft in the bills of the bank." Was the Court right in telling them this?

Counsel for the plaintiff in error, say no.

They say, first, that even if the defendant would be entitled to pay the draft, in the bills of the bank, to the *bank itself*, he is not entitled to do this, to the *receiver*.

[1.] But Lord Hardwick, in *Skip vs. Howard*, says, that the appointment of a receiver, "does not all affect the right." *Stor. Eq. Jur.*, § 831.

And so great an authority as Lord Hardwick, may be safely followed in a statement so reasonable.

It follows then that any defence which might have been made by the defendant, against the bank, may be made by him, against the receiver.

They say, secondly, that the defendant would not have the right to pay this draft, in the bills of the bank, even to the bank itself.

[2.] The fifteenth section of the Act of 1832 "to secure the solvency of all the banking institutions in this State," is in the following words: "The notes and bonds hereafter made payable at and discounted by any bank, shall, when transferred to any other bank, continue payable in the bills of the bank at which they were so made payable and discounted, in the same manner and on the same principles as if they were still holden by the bank, at which they were made payable and by which they were discounted. *Provided*, That nothing herein contained shall be construed to take away from any bank, any rights which are secured to it by the provisions of its charter. *Cobb*, 101.

If what is implied in all these words, except the proviso, were expressed, the words would be as follows: Whereas, by the law as it stands at present, *all of the paper* discounted by a bank, is, whilst held by the bank itself, payable in its own bills, and none of such paper, is, when transferred to others, payable in those bills; therefore, by the law, as it shall hereafter be, *some* of such paper, shall, when transferred, if transferred to a *bank*, still be, ("continue,") payable in those bills; viz: the part of such paper which consists of

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“notes and bonds made payable at” such bank. The aim was, to alter the old law, to some extent, so far only as banks were concerned, and to put them, when transferees of certain kinds of paper from one of themselves, on a footing worse than that of other transferees; viz: on a footing no better than that of the transferring bank itself, which would have to receive its own bills, in payment of such paper.

The section, then, contains a legislative declaration, that all the paper of a bank, whilst held by the bank itself, is subject to be paid in the bills of the bank. Such a declaration is itself, a law.

And what objection can there be, to the law? When a bank solicits and obtains the privilege of passing to others, its bills as money, it, by the strongest implication, undertakes, that it will receive from others, its bills as money.

We think, that the charge was right.

Judgment affirmed.

JETER & FORBES, plaintiffs in error, vs. HAVILAND, KEESE & Co., defendants in error.

- [1.] An attorney at law has no authority as such to receive in payment of, or as collateral security for a debt placed in his hands for collection, notes on third persons. The client may ratify the act, or the authority may be proven by the usual course of dealings between the attorney and client.
- [2.] When there is an irreconcilable conflict in the testimony of witnesses of equal character and respectability, superior credit is to be given to those who have the best opportunity of knowing the facts.
- [3.] In such cases, if one of two witnesses had an interest in noting and remembering the facts, and the other had no such interest, the witness is most likely to remember whose interest it is to remember.

Assumpsit, from Marion county. Tried before Judge WOBILL, September Term, 1857.

Jeter & Forbes vs. Haviland, Keese & Co.

An action was brought by James C. Haviland and others, carrying on business under the style of Haviland, Keese & Co., against Henry M. Jeter and William H. Forbes, upon a promissory note for \$1,260 20 and interest. To this action the defendant Jeter pleaded payment; that by way of payment he had turned over and delivered to Messrs. Williams & Oliver, the attorneys of the plaintiffs, notes on third persons to the amount of \$1,200, which the plaintiffs, by their attorneys, received and accepted as a payment on the note, and that Williams & Oliver had collected on said notes \$1,200.

Defendants' counsel proposed to read in evidence a receipt made by Williams & Oliver, containing a list of the notes which had been handed to them, and signed

"Received of H. M. Jeter, the above described notes for collection.

WILLIAMS & OLIVER."

Plaintiffs' counsel objected to the reading of this receipt in evidence, unless the defendants first proved that the plaintiffs themselves had agreed to have the amount of the notes which had been turned over to Williams & Oliver when collected, applied in payment of the note sued on; and the Court refused to allow the receipt to be given in evidence to the jury, and to this refusal the defendant excepted.

Defendant then introduced the testimony of *Jack Brown*, taken by interrogatories, which was to the following purport: That in January, 1853, Jeter turned over notes to the amount of several thousand dollars to Williams & Oliver, for the purpose of liquidating claims of about the same amount against the firm of Jeter & Forbes; witness thought the note held by Williams & Oliver against Jeter & Forbes belonged to Haviland, Keese & Co., the plaintiffs in the action; witness does not know at whose instance the notes were turned over, and does not know whether the plaintiffs agreed to take them

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in part payment of the note sued on; witness only knows what occurred between Williams & Oliver, (the attorneys of the plaintiffs,) and one of the defendants, Dr. Jeter, which was, that when the collaterals were collected, the money was to go in part payment of the notes against Dr. Jeter and Jeter & Forbes belonging to Haviland, Keese & Co. The notes turned over by Jeter lacked two or three hundred dollars of being equal to the amount of the notes held by Williams & Oliver against Dr. Jeter and Jeter & Forbes.

In answer to cross interrogatories, the witness stated that Dr. Jeter turned over the notes as collaterals, to be applied to the payment of notes belonging to the plaintiffs, against the defendants.

Defendants' counsel also proposed to prove by the evidence of *H. K. Lamb*, that he had heard a conversation between Dr. Jeter and Oliver, in which the receipt and list of notes were exhibited, and that Oliver admitted that all the notes contained in that list, except notes to the amount of \$394 13, had been collected, and that some of these latter could have been collected by proper diligence.

Defendants then introduced as a witness, *Thadeus Oliver*, one of the plaintiffs' attorneys, who proved that Mr. Stephenson, the clerk or agent of the plaintiffs, with whom witness had frequently had business, agreed and consented that these notes should be received, and when collected, applied to the payment of notes against Dr. Jeter and Jeter & Forbes. Witness (on cross examination) also stated that the firm of Williams & Oliver had in their hand several thousand dollars in notes of plaintiffs on Jeter and Jeter & Forbes, and that Jeter turned over to Williams & Oliver a considerable amount in notes as collaterals, and that at the time the receipt was given, the notes were turned over, not for the purpose when collected, of paying the note sued on, but to go in payment of the notes against Dr. Jeter individually, and if any thing was left it would go in part liquidation of the note sued on. That several of the notes turned out to be insolvent and

could not be collected, and that the amount collected was not more than sufficient to take up the individual notes of Dr. Jeter, and nothing was left to go in payment of the note sued on. That when the notes were turned over Jeter begged for time, and did not want to be sued; and on Jeter's promise to pay it before long, he (witness) let a Court pass, and that the note was sued on before he would have had time to collect the collaterals.

The Court, upon this testimony, allowed the defendants to read the receipt in evidence.

The Court charged the jury, among other things, that the counsel on both sides had agreed that there was a conflict in the testimony of the witnesses, and he left it to the jury to determine whether there was a conflict in the testimony; and if there was an apparent conflict, it was the duty of the jury, if they could, to reconcile it so that all the testimony could stand. But if they found that there was an irreconcilable conflict, then there were certain rules of law to guide them in determining to which witness they should give the most credit. One rule was, that the witness who had the best opportunity of knowing the facts was to be believed in preference to one whose opportunities were not so good. Another rule was, that the witness who had the most interest in noticing and remembering the facts, was to be believed in preference to the one that had no interest in taking notice of the facts. When the witnesses were of equal intelligence and veracity, these rules would be observed in determining which was entitled to the most credit. Another rule was, that when one witness spoke positively to the facts, and the other not positively, but from belief, the one who testified positively was to have the preference over him who spoke not positively but from belief. Another rule was, that the witness who was corroborated by other circumstances was to be believed in preference to one who was not corroborated.

The last two charges were given at the request of defendants.

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The jury found for the plaintiffs.

The defendants excepted, alleging error in the several rulings, decisions, and charges aforesaid.

INGRAM, for plaintiff in error.

BLANDFORD & CRAWFORD, *contra*.

By the Court.—McDONALD, J. delivering the opinion

All the testimony which the defendants offered was read to the jury, and the error assigned is, that a part of it was rejected when first offered.

[1.] The receipt of Williams & Oliver was given to H. M. Jeter, for notes for collection. They were Jeter's attorneys as to the notes received. When they should collect the money they were, from the face of the receipt, responsible to Jeter for it, and had no right to appropriate it to the payment of his or any other person's debts, without his authority. They were, at the same time, attorneys for Haviland, Keese & Co., and, as their attorneys, held the note sued on, against Jeter & Forbes, and others against Jeter and Jeter & Forbes, for collection. One of the plaintiffs in error pleaded that he had turned over to attorneys for defendants in error, notes on third persons, to the amount of twelve hundred dollars, as a payment on the note sued on, to be applied as a payment when collected, and it is averred that the notes were collected. A receipt given to H. M. Jeter by Williams & Oliver, for certain notes for collection, was tendered in evidence, without proof of authority from the defendants in error to their attorneys, to receive them in payment or as collateral security. The Court rejected the receipt, and his decision is excepted to.

An attorney at law has no authority, as such, to take promissory notes in payment of a debt in his hands for collection, or even receive them as collateral security. Like any other agent, he takes them on his own responsibility, and unless his client ratifies the act, he is not bound. The course of

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dealing between the attorney and client, in which such things have been allowed, may be evidence of authority. In the absence of proof of authority of any sort, the Court properly rejected the receipt when first offered. Afterwards, when proof was offered which the presiding Judge considered sufficient, the receipt was read in evidence to the jury.

[2-3.] The charge given to the jury at the request of the defendant in the Court below, cannot be excepted to by him, and the rules laid down by the presiding Judge, as to the comparative credit due to witnesses when there is an irreconcilable conflict in their testimony, is supported by law and common sense.

There are other circumstances that might have been added by the Court, as to the strength of the memory of the witnesses, and the absence of interest in the result of the cause on the trial of which the evidence is given. But as it does not appear that those rules applied in this case, it was perhaps best not to advert to them.

Judgment affirmed.

JAMES WILLIAMSON, et al., plaintiffs in error, vs. LAWRENCE WALKER, et al., ex'ors, defendants in error.

A fraud practiced by an executor, in the sale of his testator's effects, is a good defence to an action on a note given for the article on the sale of which the fraud was practiced.

Certiorari, in Taylor Superior Court. Decision by Judge Worrill, at October Term, 1857.

The facts of this case are as follows:

Lawrence and Freeman Walker, executors of Persons

Williamson et al. vs. Walker et al.

Walker, deceased, brought suit in a Justice's Court, against James Williamson and W. R. Miller, on seven promissory notes, each for thirty dollars. The notes were given for two mules, bought by Williamson at a public sale of the estate of testator, and Miller signed them as his security.

Williamson appeared at the appearance Term of the Justice Court, and pleaded,

1st. A breach of warranty.

2d. Total failure of consideration as to so much of said notes as was given for one of said mules—the same being one hundred dollars.

3d. Partial failure of consideration as to the same.

4th. Fraud and misrepresentation.

Upon the trial, plaintiffs offered in evidence the notes.

Defendants introduced *Jesse Stallings*, who testified, that he was the auctioneer at the sale of said property; that there was an apparent defect in the eyes of the mule, and that it was thought to be about blind, and was selling for twenty-five dollars when Freeman Walker came up, and being asked if the mule was not blind or nearly so, he replied, "that the injury to the eye was caused by the rubbing of the blind of the bridle, and that the mule's eyes were good." The bid was raised immediately from twenty-five to seventy-five dollars, and the mule was knocked down to Williamson at one hundred dollars.

Mr. Martin testified, that he had known the mule ever since defendant purchased it; it was *moon-eyed*; blind at times, and could see a little at other times; was worth twenty-five or thirty dollars.

The jury found for the plaintiff twenty dollars in each case. Thereby allowing defendant the sum of seventy dollars on account of the unsoundness, there being seven cases, each on a thirty dollar note.

Plaintiffs excepted, and sued out certiorari to have said findings reversed.

It was agreed that the decision in one case should govern all.

The presiding Judge of the Superior Court, upon hearing the case, ordered a new trial, upon the ground that the jury in the Justice's Court found contrary to the evidence, it being his opinion that there was no evidence to authorize them to find that plaintiffs intended to bind themselves individually, upon the warranty of the mule; and holding, that although plaintiffs warranted the mule, yet they could not, under the Act of 1854, bind the estate of their testator.

To which decision counsel for defendants excepted.

GRICE & WALLACE, for plaintiffs in error.

REESE, for defendants in error.

By the Court.—McDONALD J., delivering the opinion.

The presiding Judge in the Court below seems to have put his decision on the ground solely that the representation of the executor was a warranty and nothing more.

A warranty may be made without fraud, and bind the party for any defect in the article sold at the time of sale, whether the defect was known to him or not, and the Act of 1854 protects the executor from *personal* responsibility on such a warranty, made at the sale of the testator's effects. It would be monstrous to hold, that by reason of that statute, an executor, by a wilful misrepresentation of the soundness of property sold by him as executor, which is known by him to be unsound, might impose on the community, and increase the assets of the estate. The law does not countenance this trickery and unfair dealing in the representatives of estates, and the statute affords no protection in such

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case. The jury which tried the cause, were warranted by the evidence to find that the executor had been guilty of a fraud in making the representation in respect to the eyes of the mule, and to allow the defendants the excess for which the mule was sold to them over his actual value, by reason of the fraud, as a credit on the notes. The assets of the estate will not be injured by that; for, if a mule of the value of thirty dollars only, came to the hands of the executor and by reason of his fraud, one hundred dollars instead of the thirty came to his hands, is it right that the estate should retain the difference? There is no reason why the assets of the estate should be increased by such fraud. It would be offering a premium for fraud and wrong to persons holding the office of executor. We do not say that the executor would not be liable personally in an action against him for the fraud; but it is against conscience for the estate to retain money thus obtained. The estate cannot be injured by litigation occasioned by the fraud of the executor. Expenses incurred by his misconduct cannot be allowed him as a charge against the estate. Hence the estate, in such cases, cannot be the loser if those who have the supervision of the executor's accounts do their duty.

But it is said that if the purchaser has been injured by the fraud, his remedy is in a Court of Equity. Courts of Chancery will grant relief, no doubt. 1 *Vernon*, 227. Courts of Law have concurrent jurisdiction with Courts of Equity, in matters of fraud, and there can be no reason to send a defendant to a Court of Equity in such case. The remedy is more tedious, troublesome, and expensive to all parties. In that Court reparation would be made to the injured party, and the culpable executor would be decreed to pay expenses and costs, and the estate would be left in the condition it would have been, if there had been no fraud. Such will be the precise effect at law, for the fraudulent executor's account cannot be allowed by the Ordinary, for his expenses, costs, and trouble.

We are not to be understood as deciding that a person who purchases at an executor's or administrator's sale, and who has made a bad bargain, and there has been no fraud, has a remedy. Such sales stand in that respect on the footing of sales in market overt.

Judgment reversed.

THE STATE OF GEORGIA, plaintiff in error, vs. JOSEPH CARSWELL, claimant, defendant in error.

A recognizance to appear to answer to a criminal charge, does not bind the lands, or other property, of the cognizor, until the recognizance has been forfeited and reduced to judgment.

Claim, from Marion Superior Court. Tried before Judge WORRILL, at September Term, 1857.

A *fiery facias* issued upon a forfeited recognizance, at the suit of the State of Georgia against Jordan Davis and William Davis, was levied upon a lot of land as the property of said Jordan. Joseph Carswell interposed a claim to said land, which was returned by the Sheriff to be tried and determined as provided by statute.

The parties submitted the case upon the following agreed statement of facts:

That William Davis was charged with having committed an offence or misdemeanor in the county of Muscogee, and entered into recognizance before the Inferior Court of that county, upon the minutes of said Court, with Jordan Davis as his security, in the usual form, for his appearance, &c. At the time this recognizance was entered into, Jordan Davis was the legal owner and in possession of the lot of land lev-

ied upon, situated in Marion county. That afterwards, and before the forfeiture of the recognizance, said Jordan sold and conveyed said land to Joseph Carswell, the claimant, who was in possession at the time of the levy. Afterwards, said recognizance was forfeited agreeably to law, judgment duly signed, and a *fi. fa.* issued and levied upon said land, in the possession of claimant.

Upon this statement of facts, Judge Worrill charged the jury, that the recognizance was not a lien on the land from its date, but only from the time of its forfeiture, and that they must find for claimant.

The jury found accordingly, and plaintiff in *fi. fa.* excepted to said charge, and assigns the same as error.

JOHN PEABODY, for plaintiff in error.

BLANDFORD & CRAWFORD, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Does a recognizance to appear to answer a criminal accusation, bind the lands of the cognizor, from its date? The Court below held that it did not, but bound them only from its forfeiture.

The eighteenth section of the statute of frauds, is not to be found in Schley's digest, or in any work that is within my reach. In an abridgment of English statutes, "printed by his Majesty's Printers and by the assigns of Edward Sayer, Esq.," in London, 1720, the section is given in these words: "The day of the month and year of the enrolment of recognizances, shall be set down in the margin of the Roll; and no recognizances shall bind lands in the hands of Purchasers *bona fide*, and for valuable consideration, but from the time of such enrolment." *No recognizance*, is a universal expression, and must therefore, include recognizances to the King, as well as, those to private persons.

But it is said, for the plaintiff in error, that this section does

not extend to recognizances made to the King. We are not satisfied that this is so, and, therefore, are not satisfied, that even the *English* law at the time when it was adopted by Georgia, was such that it made a recognizance like the one in question, bind lands as against purchasers, unless it was enrolled.

But, be that as it may, we think, that the law of Georgia, as that law stands at present, is not such as to have this effect; at least in regard to recognizances of this kind. The Act of 1810, "to point out" a "rule for the priority of judgments," declares, "that all the property belonging to defendant or defendants, shall be bound and subject to the discharge of the first judgment or judgments." *Cobb Dig.* 495.

The Act of 1831, to make uniform the proceedings against bail in criminal cases, says, that, "if no sufficient cause shall be shown to the contrary, judgment shall be entered up by motion, against the principal and security."

This Act, then requires, that a *judgment* shall be entered up on the recognizance. Suppose that when this judgment is so entered up, there exists some older judgment against the cognizor, will not that judgment under the Act of 1810; have the precedence over the judgment on the recognizance? We think that it will. But if so, it must be, because the recognizance does not take lien from its date, but only from the date of the judgment on it.

The twenty-sixth section of the judiciary Act of 1799, also, declares, that, "all the property" of the defendant, "shall be bound from the signing of the first judgment." *Cobb's Dig.* 1139.

The twenty-fifth section had declared, that "all bonds and other specialties, and promissory notes, and other liquidated demands, bearing date," &c., should "be of equal dignity, and be negotiable by endorsement," &c.

This makes a promissory note and a recognizance, of the same dignity. One of the chief elements of dignity, is precedence—superior lien. Therefore, a recognizance cannot

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have precedence—superior lien—over a promissory note. But a promissory note does not have any lien, until reduced to judgment. Must not the same be true, of a recognizance?

Again, the twenty-seventh section contains these words: “no confession of judgment shall hereafter be entered up, but in the county where the defendant or defendants may reside, or unless the cause hath been regularly sued out, and docketed in the usual way, as in other cases, nor until such cause be called in order by the Court for trial.” This means, doubtless, that no *judgment* shall be entered up, on a confession of the cause of action, but in the county, &c. Why, because the lien was to start with the *judgment*, not, with the confession.

Now a confession of the debt sued for, in open Court, is in reality nothing but a *recognizance*. It is an *acknowledgment* of the debt, and if it, by itself, before judgment entered on it, has no lien, why should any other recognizance fare better?

Taking all these acts together, we think, we may say, that it was the intention of the legislature, that recognizances, and other things of like character, were to stand on the footing of promissory notes, and other ordinary debts, in respect to lien, and therefore, that they were not to bind property of any sort until reduced to judgment.

With this view other important acts harmonize; as the Act of 1792, prescribing the order of payment of the debts of an intestate. One class of debts made by that Act, is denominated, “bonds or other obligations.” The word, “obligations,” must include equally, promissory notes and recognizances, for there is no other class mentioned that can so well include either.

Upon the whole, we think, that recognizances of this sort, do not bind land or other property, until reduced to judgment, and therefore, we affirm the decision of the Court below.

Judgment affirmed.

PETER McLAREN, plaintiff in error, vs. BIRDSONG & SLEDGE, defendants in error.

- [1.] A juror who states in Court to the presiding Judge, that he is afraid he cannot do one of the parties justice, and the party proposes to swear him, but the Court decides him to be competent without, is an incompetent juror.
- [2.] A cause may go to trial on the petition and answer. An issuable plea may go to the jury as answer to the plaintiff's case in the petition—and the plaintiff need not join issue thereon.
- [3.] A proposition to settle a debt made by defendant in attachment for a debt not due, before the levy, in an action for maliciously suing out an attachment, may be received in evidence.
- [4.] Parol evidence of an order for sale of perishable goods attached admissible when the office of the Clerk of the Court to which the attachment was returnable is searched and it cannot be found on record or of file.
- [5.] Evidence of the value of a stock of goods in the fall before an attachment was levied—the levy being in May, is not receivable as evidence, or as a criterion of value at that time.
- [6.] In actions for a malicious suit, all evidence is admissible which tends on the one hand to prove the want of probable cause for the suit, and on the other to prove its existence.
- [7.] Proposition by one of the defendants who had actually left the State, made after the attachment had been levied, to secure the debt, is not admissible in such an action.

Case, in Muscogee. Tried before Judge WORRILL, May Term, 1857.

This was an action on the case, by Birdsong & Sledge, late partners in a mercantile business in the City of Columbus, against Peter McLaren, for suing out an attachment maliciously and without probable cause against plaintiffs, whereby their goods and merchandise were levied on by the Sheriff and sold, at a great loss and sacrifice, and the business of plaintiffs broken up and destroyed:—damages laid at ten thousand dollars.

The defendant pleaded—first, the general issue; second, a special plea, that Birdsong & Sledge were indebted to him \$489,55, and that he was informed, and believed, that Sledge,

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one of said firm, had secretly removed his property and part of the goods of Birdsong & Sledge to Alabama, and the residue of their goods was then being boxed up to be removed to Alabama, and that Sledge was then in Alabama for the purpose of receiving and disposing of the same, and so believing, defendant, under the advice of counsel, caused the attachment to be issued, and denies that the same was sued out by him maliciously, but that he had probable cause and that he is ready to verify, &c.

The case came on to be tried on the appeal, and after the jury was stricken and while the plaintiff's counsel was opening his case to the jury, prior to the introduction of any testimony, Mr. Pettitt, one of the jurors, left the jury box and went to the Judge on the bench, and stated to him that he had been in the employ of one of the parties, (McLaren,) and had prejudices which he feared would disable him from giving an impartial verdict. The Judge called up to him the counsel on both sides and informed them of the communication which the juror had made to him. The defendant's counsel moved to examine the juror as to his competency, and while this motion was being discussed the juror rose in his seat and said "I have been in the employ of McLaren and am afraid I cannot do him justice." Defendant's counsel then moved that the juror be set aside. The Court held him to be a competent juror and ordered the trial to proceed, to which ruling defendant excepted.

Defendant then moved that plaintiffs be compelled to demur or take issue on the pleas filed by him. The Court overruled the motion and defendant excepted.

In the progress of the trial plaintiff proposed to prove by a witness, (A. S. Rutherford,) that prior to the levy of the attachment, Birdsong offered to secure McLaren by delivering to him goods—defendant objected to this testimony.

The Court overruled the objection, allowed the witness to answer, and defendant excepted.

Plaintiffs then proposed to prove by the same witness, (Rutherford,) who was the Sheriff at the time, that the goods attached were sold by order of Court. Defendant objected to the witness proving the contents of an order of the Court. The Court overruled the objection, and the witness testified that the goods were sold by an order of Court, obtained at his instance, and defendant excepted.

Plaintiffs then proved by a witness, (Cowdrey,) the value of their stock of goods the fall previous to the levy under the attachment. The defendant objected to this evidence and moved to exclude it. The objection was overruled, and defendant excepted.

Defendant objected to so much of the testimony of John R. Hull, (introduced by plaintiffs,) as related to propositions to settle, made by Birdsong to McLaren or by McLaren to Birdsong, before or after the issuing of the attachment. The Court overruled the objection, and defendant excepted.

Upon cross-examination, defendant proposed to prove by Hull, that the whiskey for which plaintiffs owed defendant, had been sold at a very low rate, and that shortly before the attachment was taken out, defendant was so friendly with Birdsong & Sledge, that he offered, when he went to New Orleans, to buy Western produce for them at a low commission. Plaintiffs objected to this proof—the Court sustained the objection and excluded the testimony, and defendant excepted.

Plaintiffs then read the depositions of Baker and Lewis, and to so much of their answers as prove or go to show propositions made by Sledge to McLaren after the attachment was levied, defendant objected. The Court overruled the objection, and defendant excepted.

Plaintiffs then read the depositions of B. F. Reid. To

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the latter part of the answer to third interrogatory, defendant objected. The Court overruled the objection, and defendant excepted.

The answer of Reid to third interrogatory, was, that he was acquainted with the stock of goods of plaintiffs, on the 5th of May, 1848, and supposed the whole stock to have been worth six thousand dollars. (The attachment was sued out and levied 5th May, 1848.)

Defendant also objected to so much of Reid's depositions as showed propositions of Birdsong to McLaren to turn over goods to secure his debt. The Court overruled the objection, and defendant excepted.

The plaintiffs having closed and defendant introducing no testimony, the Court, after argument, amongst other things, charged the jury, that unless, from the evidence, they believed that the attachment was maliciously sued out to vex and harass the plaintiffs, they could not recover.

The jury found for the plaintiffs three thousand two hundred and fifty dollars. Whereupon, the defendant moved for a new trial, setting out as grounds therefor, all the rulings and decisions above excepted to, and also because the verdict was contrary to, and against the weight of evidence, and contrary to law and the charge of the Court. The Court refused the motion for a new trial, and defendant excepted.

HOLT; MOSES; and WELLBORN, JOHNSON & SLOAN, for plaintiffs in error.

DOUGHERTY, *contra*.

By the Court.—McDONALD J. delivering the opinion.

The counsel for plaintiff in error moved in the Court below, for a new trial on the several grounds of exception

made by him to the rulings and decisions of the presiding Judge during the progress of the trial, and because the verdict of the jury was contrary to and against the weight of evidence, and because it was contrary to law and the charge of the Court.

[1.] We think the Court below erred in deciding, that M. M. Pettitt was a competent juror. The counsel for defendant below, proposed to swear him as to his competence, when the juror rose from his seat and said that he "had been employed by McLaren and was afraid he could not do him justice." The Court without further examination pronounced him a competent juror. He certainly had a prejudice or bias resting on his mind against the defendant, and it is as important in civil as in criminal cases that the rights of the parties should be determined by impartial jurors.

Jurors on both the civil and criminal side of the Court, must be "*omni exceptione majores*." It is not just that a suitor's cause should be submitted for trial to his personal enemy, or one who will allow his prejudices to control him.

[2.] Special pleadings are prohibited by the laws of this State. The defendant must make his answer, which may contain as many several matters as the defendant may think necessary for his defence. They may be inconsistent or contradictory, and the defendant's answer to the plaintiff's petition shall be sufficient to carry the cause to the jury without a replication or other proceeding. *Cobb*, 486, 488. If a plea in abatement be filed, it may be replied to, and the usual course under the English practice pursued in relation thereto; but what are termed issuable pleas, go to the jury as defences to the action, and make the issue on the petition, and are to be tried in that way, without a distinct issue thereon.

[3.] The testimony of the witness, Rutherford, as to the proposition made by plaintiff to settle by delivering goods to the defendant, was admissible evidence to the jury. The question is as to its admissibility, and not as to its effect. It

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is certainly admissible, and when in connection with other circumstances in proof, as having some influence in establishing the *quo animo*, with which the attachment was issued, although, the proposition was not made until after the attachment had been issued but before the levy.

[4.] By the same witness the plaintiff proved that there was an order passed by the proper Court to sell the attached goods. The testimony was properly received. The attachment was returnable to the Inferior Court, and the presumption is that the order to sell was passed by that Court, and if returned, that it was returned to the office of the Clerk of that Court. The records and files of the Inferior Court were searched for the order and it could not be found. There was an appeal to the Superior Court and a partial search was made for it, in the Clerk's office of that Court and it was not found there. It was not a paper, or file, however, which the Clerk of the Inferior Court should have transmitted with the appeal.

[5.] The testimony of Cowdrey as to the value of the stock of goods in the fall previous to the levy of the attachment, ought not to have been admitted by the Court. It could not elucidate the issue, and could form no criterion, from which a judgment of the value of the same stock in the May afterwards could be formed.

[6.] The evidence given by Hull, in regard to the propositions made by Birdsong, to settle the debt prior to and after the issuing of the attachment, were admissible in evidence. The parts of the evidence must be considered as making a whole, and the entire evidence of the plaintiff, after proof of the issuing of the attachment, must be considered as directed to the establishment of the want of probable cause for the issuing of it. Every fact or circumstance tending to prove, on the one hand, that there was no necessity for the issuing of the attachment, and a motive operating upon the plaintiff in attachment, other than a purpose to secure or collect his debt, may be given in

evidence to establish the want of probable cause for issuing the attachment; as that the stock of goods had not been removed; that no attempt had been made to remove them; that one of the defendants was there, openly and in a condition that the ordinary process of law might have been served upon him and that bail might have been required of him. *Cobb*, 483. That before the attachment was issued, before the debt became due, a proposition was made to deliver goods to the plaintiff in payment, or to be sold at auction until paid, and the rejection by the plaintiff of the proposition, and similar offers and rejections after the issuing of the attachment. On the other hand, the plaintiff in attachment may offer in rebuttal, facts and circumstances to counteract the force and effect of the proof against him; as that one of the defendants had actually removed from the State and carried his individual moveable property; that, before he issued the attachment, he sought the best professional advice, stating fully all the facts of his case, and that he pursued the advice when it was obtained, &c. We must not be understood as holding that a creditor is to be condemned for rejecting any proposition made by his debtor, which others might deem reasonable and just, and which they, if in his place, would probably have accepted. He has a right in ordinary cases to refuse absolutely, without assigning a reason. But a legal contract between debtor and creditor, is the law of both. The creditor has no right to demand his debt until it becomes due. That is his bargain. The debtor has no right to remove his property and himself beyond the jurisdiction of the State, before the debt is due, to imperil its collection. That is his bargain. If he do, or he be in the act of doing it, so that his person cannot be arrested, to be amenable to the ordinary process of law, then his property may be attached; but if he be in the act of removing with his property, but the ordinary process of law may be served upon him, the debt not being due, the creditor may require bail of him. The right and

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obligation are mutual and the law affords stringent remedies to secure the right and enforce the obligation. If the debtor subjects himself to the operation of the remedy, it is his voluntary act and he ought not to complain, if it be pursued in the terms of the law. The creditor must be assured that his debtor has subjected himself to this rigorous process, before he resorts to it—for if he uses it without the existence of probable cause for doing so, the law imputes to him a motive of oppression and wrong, for which his debtor has a remedy. If he uses a more stringent remedy, which tends to the great damage of the debtor, when he is only entitled to a less injurious remedy, and he adopts it intentionally and for the purpose of wrong, it is a matter to be weighed and considered in the case. Hence, the testimony must be regarded by the Court as tending to establish, on the one hand, the absence of probable cause, and, on the other, its existence, and it is admissible or inadmissible as it tends to prove the issue.

If the proposition of McLaren to purchase produce at *low commissions*, was, as we interpret in this relation, to purchase at lower commissions than others, so as to show that it could proceed from motives of personal kindness to the plaintiffs, it ought to have been admitted as tending to repel the inference of malice in suing out the attachment.

[7.] The proposition made by Sledge, who had removed from the State and was residing in Alabama, to secure the debt, and made after the attachment had been levied, ought not to have been received.

We think the testimony of Reid as to the value of the goods, he having been clerk and conversant with the business, was admissible; and also his evidence as to the proposition of Birdsong, made to McLaren, to turn over goods to settle his debt.

As the case goes back for trial, we pass no judgment upon the verdict rendered in the cause, whether it be against

the weight of evidence or contrary to the charge of the Court.

Judgment reversed.

WILLIAM SCHLEY and others, plaintiffs in error, vs. ROBERT E. DIXON and others, defendants in error.

- [1.] When the capital stock of an incorporated bank is subscribed and paid in, it constitutes a trust fund for the benefit of the stockholders, but when notes are issued and circulated thereon, another and superior trust arises and the stock must be first applied to the payment of the notes of the bank.
- [2.] If the charter require a certain amount of the capital stock to be paid in before notes can be issued, but the directors nevertheless proceed to issue notes, if the bank fail or become insolvent, the bill holders and creditors of the bank may proceed at once against the stockholders and directors.
- [3.] If stockholders do an illegal act or omit to do what the law requires, by which the rights of others are prejudiced, the law declares such conduct fraudulent.
- [4.] One creditor may sue in equity in behalf of himself and others standing in the same relation to the subject of the suit.
- [5.] When a party has to go into equity to enforce a judgment obtained by him at law, that judgment must be presumed to have been regularly obtained upon due proof of every allegation to entitle the plaintiff to recover.
- [6.] The maxim "*actio personalis moritur cum persona*," does not apply to cases of which Courts of Equity have cognizance.
- [7.] The assignees and successors of stockholders and directors of a bank, are not bound by the fraud of their assignors and predecessors, if they become assignees and successors without fraud.
- [8.] Charges in a bill that a small sum was paid in money for bank stock, and the balance paid in notes for stock notes, and that the purchasers became President and directors and reported to the Governor that one-fourth of the capital stock was paid in, when the report was known to be untrue,

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require an answer and explanation. The charges uncontradicted warrant the strongest conclusions against the parties.

[9.] Charges establishing a plain liability of parties sued must be answered.

[10.] An assignment by a bank of its effects to which the creditors are not parties or consenting, cannot deprive them of the right to sue stockholders and directors for breach of duty.

In Equity, from Muscogee County. Decided by Judge WORRILL, November Term, 1857.

The bill of exceptions in this case was filed to the decision of the Court below—sustaining a demurrer and dismissing the bill. The following are the facts of the case:

William Schley having obtained judgment in an action at law upon a bill of exchange against the Planters & Mechanics Bank of Columbus, filed his bill in equity on behalf of himself and other creditors of the bank, against Ann E. McDougald as administratrix of Daniel McDougald, James M. Chambers and Elvira Flewellen, Abner Flewellen, and William H. Chambers, as administratrix and administrators of Abner H. Flewellen, who had been directors in the bank, seeking to hold them individually liable for the amount of the notes. In this bill he alleged that under the statute incorporating the bank the capital stock was to consist of \$1,000,000 and the stockholders were required to pay 25 per cent. on the amount of that capital stock, in specie, before the Board of Directors should be permitted to issue their bank notes. That in February, 1838, the bank commenced business and issued bank notes. That the bank did this without the payment of the 25 per cent. in specie, as required by the act of incorporation, and issued bills to the amount of \$200,000, when only about \$1000 had been paid in in specie, and the promissory notes of the stockholders were put into the bank in lieu of specie. That in October, 1839, James M. Chambers and Abner H. Flewellen, purchased stock in the bank and were elected directors, and continued as such till February, 1843. That Daniel Mc-

Dougald, since deceased, (to whom Ann E. McDougald had been appointed administratrix,) was active in putting the bank into operation, was a director and afterwards President of the bank, and continued so until April, 1841, and held stock to the amount of 2500 shares. That neither McDougald, Chambers, or Flewellen were original subscribers for the stock, but became owners by purchase and transfer. That for such stock they paid little or no money, but paid for the same by giving their notes to the bank in the stead of the notes of those from whom they purchased. That by an Act of the State of Georgia, the President and Directors of Banking Companies are required to report to the Governor semi-annually the condition of their banks—a list of stockholders and the amount paid in on each share of stock. That McDougald, Chambers, and Flewellen, did, in 1839, and as long as they acted as President and Directors, report to the Governor that 25 per cent. of the capital stock had been paid in, (a copy of one of the reports was annexed to the bill.) That these reports were regularly published in the newspapers. That relying on the statements made in these reports, complainant purchased of the bank a bill of exchange, and that the bill was not paid but returned to complainant, and when he presented it to the bank payment was refused. That he had, in an action on the said bill of exchange, recovered judgment against the bank and caused execution to issue thereon which was returned *nulla bona*. That the bank became insolvent in February, 1842. That the 25 per cent. on the capital stock had never been paid in, but that the notes of Daniel McDougald for stock, remained in the bank till June, 1841, when he sold and transferred to Benjamin W. Walker, a large portion of his stock, and substituted the notes of Walker in lieu of his own. That Walker was then insolvent and that his notes to the amount of \$74,000 have never been paid. That the notes of Chambers and Flewellen remained in the bank till 1842, when they took them out and destroyed them; the notes of

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Chambers amounting to \$3000 and those of Flewellen to \$2500. That at the time McDougald, Chambers, and Flewellen reported that 25 per cent. on the capital stock had been paid in, they knew the same was not true, and that complainant was misled by those reports, and that he had no means of ascertaining the condition of the bank except through those reports. That complainants had no remedy at common law, and prayed that relief might be granted against the false representations of the defendants, and that they might be compelled to pay the amount of his demand.

To this bill the defendants demurred for want of equity; and upon the case coming on for hearing in November Term, 1857, the Court sustained the demurrer and dismissed the bill.

To this decision of the Court the plaintiff excepted.

DOUGHERTY, for plaintiff in error.

HOLT; and JONES, *contra*.

Judge BENNING having been of counsel in this case, did not preside.

By the Court.—McDONALD J., delivering the opinion.

There was a general demurrer filed to this bill, which was sustained in the Court below, and on the judgment of the Court on the demurrer, error is assigned. The counsel for the defendants in error in this Court, insist in support of the demurrer, on the following grounds:

1st. That a creditor's bill will not lie for fraud.

2d. It does not appear by the bill, that there was demand, notice and protest of the bill of exchange on which the judgment was obtained which the plaintiffs in error seeks

to enforce against the stockholders, and it was a foreign bill of exchange.

3d. The bill is not filed under the charter, but on the common law principle that the parties had been guilty of a fraud, and such being the case, it could not be brought against representatives of deceased parties.

4th. That directors who are successors of those who committed the fraud, are not bound.

5th. That the assignee of the bank should be sued and not the parties to the bill.

6th. The assignor should sue if there was a breach of trust or fraud.

7th. Complainants have an adequate common law remedy.

8th. That there are other parties who ought to be brought before the Court.

The material parts of the bill are set forth in the statement of the case.

[1.] The capital stock of an incorporated bank, when paid in, constitutes a trust fund in the hands of the President and Directors, to be managed, under the charter, for the benefit of the stockholders, and upon which bank notes may usually be issued for circulation. When the stock is subscribed and paid in, and notes are issued and circulated thereon, another and a superior trust arises in favor of the creditors of the bank, who must be paid before the stock can be withdrawn and distributed amongst the stockholders. If it be withdrawn, and the bank becomes insolvent, the bill holders may pursue it into the hands of the stockholders. *Wood vs. Dummer*, 3 *Mason's Rep.*, 308.

[2.] If the charter of a bank require a certain portion of the capital stock, in specie, to be paid in, before the directors are permitted to issue bank notes, and the stock is subscribed but the specie is not paid, and the directors, nevertheless, proceed to issue and put in circulation the bank notes, if the bank fail or become insolvent, the bill holders and creditors may proceed at once against the stockholders for

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the subscribed stock not paid in, and against the directors for a breach of trust for issuing and putting in circulation notes on unpaid subscribed stock, contrary to their duty under the charter.

[3.] If the stockholders and directors do an illegal act, or omit to do what the law requires, by which the rights of others are prejudiced, the law declares such conduct fraudulent, and if the circumstances be such as to warrant the imputation of motives of probable gain to themselves, for such conduct, great strength is added to the charge. It is impossible to conceive a stronger case than that made by this bill against the original directors and stockholders. The capital stock of the bank is one million of dollars. One-fourth of this sum, *in specie*, was required to be paid in, before the directors were authorized to issue bank notes. They issued bank notes to the amount of two hundred thousand dollars, when the sum of one thousand dollars only, or some such small sum, had actually been paid in. The stockholders gave their promissory notes to represent the specie for the balance. Parties thus culpable are certainly liable for all the consequences to persons injured by their misconduct.

[4.] The community had a right to presume that there had been a *bona fide* organization of the bank, at the time notes were issued, and to rely on the assurance which such honest organization gave them of its ability to meet its engagements and contracts. Every person injured or losing by the flagrant abuse of the extraordinary privileges granted to the company, is certainly entitled to a remedy, and the injury being necessarily of the same nature, the remedy should be the same. In such case, one creditor may sue in behalf of himself and all others standing in the same relation to the subject of the suit. *Gray vs. Chaplin*, 2 Sim. and Stu. 267. Justice may be done in one suit, and where that is the case, a Court of Chancery will entertain jurisdiction of one case for all, rather than drive each person to

a separate suit to recover his rights, which would lead to innumerable suits and great delay. Suits of this sort are maintainable when the gravamen is the fraud of the defendant. *Small vs. Attwood, Younge*, 458; *Hitchens et al. vs. Congreve et al.*; 4 *Russell*, 562.

[5.] The complainant in this case, who sues for himself and others, who are willing to come in, has obtained a judgment against the bank on which he has not been able to collect his debt. Hence his resort to a Court of Equity to enforce it. The judgment must be presumed to have been regularly obtained, on due proof of every allegation necessary to entitle him to a verdict, and it will not be enquired into here.

[6.] It is true that the bill is not filed under the charter. It is filed on the principle that trustees guilty of a breach of trust shall be responsible to those aggrieved by it; and that if the trustees have, or are presumed to have made any advantage by it, then it is against conscience that they or their representatives should be allowed to retain this advantage. They should respond to injured parties. The maxim "*actio personalis moritur cum persona*," does not apply to cases of which Courts of Equity take cognizance. If a defendant commit a fraud, he shall be deemed a trustee for those whom his fraud has injured, and the suit may be revived on his death, against his personal representatives.

[7.] It is insisted, however, that as it appears on the face of the bill, that Daniel McDougald, Abner H. Flewellen, and James M. Chambers, were not original subscribers for stock, they are not liable for fraud committed by the original subscribers. It is true that directors and stockholders, who are guiltless of fraud themselves, and are successors or assignees, without fraud, of those who committed it, are not bound by the acts or conduct of their predecessors and assignors.

[8.] But this bill alleges that McDougald acted a conspicuous part in putting the bank in operation, in manner

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aforesaid, and was a director, and subsequently elected its President; that each of the three persons aforesaid, McDougald, Flewellen and Chambers, became the owners of stock by purchase and transfer from other persons, that they paid no money therefor, except a small amount as a *premium* (in this relation not a very intelligible term,) for the stock so purchased, and perhaps a small sum in addition, being the amount which had been paid in by their respective vendors in the bills of other banks, but settled and paid for said stock by substituting or giving their notes in the said bank, in the place and stead of the notes of those of whom they purchased, and for the same amount and payable in the like manner. The bill proceeds to state that the said named persons, as President and Directors of the bank, reported to the Governor every six months while they were President and Directors, that twenty-five per centum of the capital stock of said bank had been actually paid in, which report was published. The bill charges that the reports were known to them to be untrue when made. These are grave charges, and enough, uncontradicted, to warrant the strongest conclusions against the parties. They may be susceptible of refutation, as they may have been defrauded by the persons from whom they purchased; but they certainly require answers and clear explanations. But the bill proceeds to state, that the notes given by the said McDougald for stock, remained in the bank unpaid, until the 14th day of June, 1841, when he sold and transferred to one Benjamin W. Walker, a large portion of his stock, to wit: thirteen hundred shares, and substituted the notes of the said Walker in lieu of his notes, for stock aforesaid, that said Walker is and was then insolvent, and that said notes remain unpaid to this day, and that they amount to the sum of seventy-five thousand dollars or some such large sum. These allegations require an answer and investigation. McDougald was President, and it is alleged that he substituted Walker's insolvent notes for his own. It is not alleged to have been

an act of the bank or Board of Directors. The case as made by the bill is strongly against McDougald.

[9.] It is alleged that the notes of Chambers and Flewellen, given for stock, remained in the bank until the year 1842, when they, still acting as directors, took said notes from the said bank and appropriated them to their own use by destroying them, that the note of said Chambers amounted to three thousand dollars and that of Flewellen to twenty-five hundred dollars. These charges establish the plainest liability of these parties for the amount of their notes respectively, and manifestly demand an answer.

[10.] The assignment is not set out in the bill, and therefore the Court cannot determine that the complainant has a remedy against the assignee for the frauds alleged in the bill against the stockholders and directors, against whom an account is asked. If it was his duty, under the deed of assignment, to call for an account for such malfeasances on the part of the directors and stockholders, and he failed to do it, the complainant might have a remedy against them, but it does not follow that the stockholders and directors of a bank, by making an assignment to which the creditors are not parties, nor consenting, can deprive the creditors of remedies against them for a breach of duty, or any act or omission by which they have been injured.

We think that the remedy, for matters of the sort complained of in this bill, is in a Court of Equity, and that a Court of Law does not furnish so complete a remedy.

It does not appear from this bill, that for the acts complained of therein, there are other necessary parties who ought to be brought before the Court.

Judgment reversed.

N. B.—Mrs. McDougald having married, Robert E. Dixon was appointed administrator *de bonis non* of Daniel McDougald, deceased.

Buchanan vs. The State of Georgia.

JOSEPH BUCHANAN, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.

[1.] On the indictment of B. for the murder of G. by stabbing, the Court charged, that if there was an attempt by G. to commit *a serious personal injury* on B., and he, B., in a sudden heat of passion, killed G. he was guilty of voluntary manslaughter.

Held, That, *serious personal injury*, must be construed to mean, an injury, greater than a provocation by mere words, and less than a felony; and, therefore, that the charge was right.

[2.] The Court also charged, that if B. provoked the difficulty, if he brought upon himself the necessity to kill G. to save his own life, the killing amounted to murder. The evidence showed, that B. had a bowie knife concealed about his person, and, in other respects it was such as to repel the idea, that his purpose was no more than a battery. The verdict was for voluntary manslaughter.

Held, That this charge was no ground for a new trial.

[3.] After a verdict of manslaughter, a person made oath that one of the jurors, had before the trial, told him, that he saw the greater part of the difficulty, and that if he was a juror, he would be compelled from what he saw—he did not know how he could get round finding him guilty of murder. The juror himself, then swore, that he did not see the crime committed, or hear any part of the evidence before the trial; that he had no bias; that he was a stranger to one of the parties, and almost a stranger to the other; and that he went for manslaughter, when others of the jury were going for murder. The evidence made out a case of manslaughter, if not of murder. The Court refused to grant a new trial.

Held, That this refusal ought not to be disturbed.

Murder, from Harris county. Tried before Judge WORRILL,
October Term, 1857.

Joseph Buchanan the plaintiff in error. was indicted for the murder of Joseph J. Gorham; he was convicted of voluntary manslaughter, and moved for a new trial, on the following grounds:

1st. Because the Court erred after giving to the jury the definition of voluntary manslaughter, as contained in the penal code, in instructing the jury that if the proof showed that there was an attempt by Gorham to commit *a serious personal injury* on the person of Buchanan, and he Buchanan at the time without notice, and in a sudden heat of

passion, killed Gorham, that he was guilty of voluntary manslaughter.

Or if the evidence proved that Gorham made an assault upon Buchanan, and therefore, Buchanan, in a sudden heat of passion and without malice, killed him, then the killing, according to the definition, would amount to voluntary manslaughter.

2d. Because the Court erred in instructing the jury, that if Buchanan provoked the difficulty, if he brought on the fight, if he brought upon himself the necessity to kill Gorham to save his own life, then the killing amounts to murder.

3d. Because the counsel for the State, in the course of the argument in conclusion, insisted that the accused used profane and provoking language in the presence of the deceased, in the streets, with a view to provoke the deceased into a difficulty, and pursued him into the billiard room, when the counsel for the accused objected to the State's counsel arguing a state of facts not authorized by the testimony as there was no proof that the accused and deceased were together in the streets before the difficulty; the Court permitted the counsel for the defendant to state their recollection of the testimony, and that the State's counsel might do the same, and leave it to the jury to determine between them; and after counsel for the accused stated their recollection of the testimony on that point, the counsel for the State proceeded to argue the case, and speaking of it as occurring in the town of Hamilton, and perhaps in the hearing of the ladies.

4th. Because, James Perry, one of the jurors who tried said case and rendered said verdict was subpoenaed as a witness on the part of the State, and had before he was selected as a juror, stated that he witnessed the greater part of the difficulty between Buchanan and Gorham, and if he was taken on the jury, he did not know how he could get round finding him guilty of murder.

Buchanan vs. The State of Georgia.

The Court refused the motion on all the grounds taken, and prisoner excepted.

WM. DOUGHERTY & D. P. HILL, for plaintiff in error.

Sol. Gen'l OLIVER; and RAMSEY & CARITHERS, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Did the Court err in refusing to grant a new trial? This is the question.

Was the charge contained in the first ground of the motion right?

It is argued that an attempt to kill a man, is an attempt "to commit a *serious personal injury*" on him; and that killing, in repelling an attempt to kill, is not manslaughter, but only justifiable homicide. In other words, that the expression, an attempt to commit a serious personal injury on a man, includes attempts to commit *felonies* on him. Consequently, that the charge amounted to telling the jury, that Buchanan might be guilty of manslaughter, although, when he killed Gorham, Gorham was trying to kill him.

Does the charge amount to this? This expression is taken from the Code. The 7th section of the fourth division, commences thus: "In all cases of voluntary manslaughter, there must be some actual assault upon the person killing; or an attempt by the person killed, to commit a serious personal injury on the person killing."

What does the expression mean here?

It is immediately followed by the words, "provocation by words, threats, &c., shall in no case be sufficient, to free the person killing," from murder.

It is, after a little, followed by the words; "justifiable homicide is the killing of a human being," "in self-defence, or

in defence of habitation, property, or person, against one who manifestly intends, or endeavors, by violence or surprise, to commit a felony on either."

The expression, then, must mean, an attempt to commit an injury, lying *between* a provocation by mere *words*, and an attempt to commit a *felony*—an injury, greater than the former, less than the latter.

And there is a common usage, that favors this, as the true meaning. We say, a serious hurt, a serious loss, a serious accident—meaning less, than a fatal hurt, a fatal loss, a fatal accident, and more, than a trifling hurt, a trifling loss, a trifling accident.

This, then, is the meaning of the expression in the statute. And whatever is the meaning it has in the statute, is, we are bound to say, the meaning it was intended to have, in the charge?

It must follow, that the objection to this charge, was not well founded.

Was the charge contained in the several grounds of the motion, right?

It is said that it might have been true, that Buchanan "provoked the difficulty"—"brought upon himself the necessity of killing Gorham, to save his own life,"—with the motive, to induce an attack on himself by Gorham, and then, under color of repelling that attack, to *beat* but *not to kill* Gorham.

Admit that this was actually true; in that case, what kind of homicide was it? No body will say, that it was *justifiable* homicide. Was it manslaughter? Where is the "sudden heat of passion?" Was it murder? Where is the "malice aforethought?" Yet it has to be murder or manslaughter; and it is as easy to make it out murder, as it is, to make it out manslaughter.

But it cannot be admitted, that this was actually true—it cannot be admitted, that Buchanan's motive was no more,

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than to get an opportunity merely, to beat Gorham, under color of preventing Gorham from beating him. The concealed bowie knife—the whole evidence forbids such an idea.

Again, it is true, that the charge said, that the killing would, (in the supposed events,) amount to *murder*, but the verdict was only for manslaughter. So the charge if wrong, did no harm.

[2.] We cannot say, that this charge, constitutes a good ground for the motion.

There is nothing of any validity, apparent in the third ground.

Is there any validity in the ground, as to the juror, Perry?

Not if we go by the juror's own affidavit. He swears, that he did not see the crime committed, or hear any part of the evidence, till the trial.

It is true, that Moore swears, that Perry told him, that he saw the greater part of the difficulty. But this, at most is but Perry's statement, not under oath, against his statement under oath.

Of the two statements, supposing that both were made, why should we not choose the one made under the sanction of an oath, rather than the one made not under the sanction of an oath? But we cannot be sure, that both were actually made; we cannot be sure, that Moore was not mistaken.

Certainly, the juror seems to have been a person, free from bias. He had never seen one of the parties—never seen the other but once. He went for manslaughter, when others of the jury, were for murder, and going for manslaughter in such a case, was anything but a sign of bias *against* the party accused.

Finally, the Judge has passed upon this ground and overruled it; and by the Act of 1856, (*Acts 231,*) the Judge takes the place of the triers of the old law. This was a ground peculiarly for triers,

We think, then, that there is nothing in this ground.

The result is that in our opinion the Court did not err in refusing to grant a new trial.

Judgment affirmed.

EDMUND C. CORBETT, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

To be a promissory note, the money specified in the face of the instrument must be payable absolutely, unconditionally, and at all events.

Indictment, from Muscogee county. Tried before Judge WORRILL, at November Term, 1857.

Edmund C. Corbett was indicted for demanding payment of a certain promissory note, knowing the same to be forged and counterfeited.

The note was as follows:

“Due E. C. Corbett or bearer, the sum of ten thousand dollars with interest from date, on a settlement, to be paid when the money belonging to the firm of Lowe & Simmons is collected. This May the 16th, 1853.

(Signed,) H. H. LOWE.”

The jury found the defendant guilty, whereupon his counsel moved in arrest of judgment.

1st. Because the instrument set out in the indictment, is *not a note*.

2d. Because the indictment is not valid—there being no offence or violation of law, charged therein.

After argument, the presiding Judge refused the motion, and counsel for the prisoner excepted.

Brown vs. Ayer and Bates.

HINES HOLT; and WELLBORN, JOHNSON & SLOAN, for plaintiff in error.

Sol. Gen'l OLIVER, and Wm. DOUGHERTY, for the State.

By the Court—McDONALD, J. delivering the opinion.

The judgment of the Court below must be reversed on the ground that the presiding Judge erred in refusing to sustain the motion in arrest of judgment made by the prisoner's counsel. The defendant was indicted for demanding payment of a note known by him to be a forged and counterfeit note.

The instrument set forth in the indictment as a note, is to be paid when the money belonging to the firm of Lowe & Simmons is collected. It is not a written promise to pay money to another unconditionally, absolutely and at all events. The money is not promised to be paid unconditionally and absolutely, for it is not payable until the money due the firm of Lowe & Simmons is collected. It cannot be said the money will ever be payable. The debts due the firm of Lowe & Simmons may never be collected, and if they are not collected, the money is not demandable on this instrument.

Judgment reversed.

HENRY BROWN, plaintiff in error, vs. ALPHA K. AYER and ASA BATES, defendants in error.

[1.] If a defendant appeals from a verdict rendered against him and gives security, the defendant is bound for the whole and every part of the judgment which may be recovered on the appeal, while the security is bound for that part only which his principal cannot or does not pay.

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- [2.] If the plaintiff receive of the defendant one half of the amount of the judgment in full of his part thereof, it is a receipt in full of the entire judgment, as the entire judgment is the part of the defendant.
- [3.] If a creditor agree to receive from his debtor a less sum in satisfaction of a greater, and the less sum is paid him and he accepts it, the contract is executed, and he cannot treat it as a nullity and recover the balance; otherwise; if the contract is executory, and must be enforced through a court of law.
- [4.] The discharge of the principal absolutely, without reserving the plaintiff's right against the security in the instrument, extinguishes the debt as to the surety.

Scire facias to revive judgment, from Muscogee. Tried before Judge WORRILL, May Term, 1857.

In 1837, Henry Brown brought an action of trover against Alpha K. Ayer. Upon the common law trial there was a verdict for plaintiff, from which the defendant Ayer appealed, and Bates became his surety on the appeal. Upon the trial on the appeal, there was a verdict for plaintiff for the sum of \$1,500, and judgment entered against Ayer, and his security Bates, 15th May, 1839, for this sum, and *fi. fa.* issued thereon. Afterwards, on the 23d, Nov., 1844, before said judgment or any part thereof was paid, Brown gave to Ayer the following receipt:

<p>“ Henry Brown vs. Alpha K. Ayer, and Asa Bates security on appeal.</p>	}	<p>Muscogee Superior Court, April Term, 1837. Prin. \$1,500.</p>
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Received, Columbus, Geo., 23d November, 1844, of A. K. Ayer, prin. the amount of one-half of the above stated *fi. fa.* his part in full of said *fi. fa.*

[Signed]

HENRY BROWN, *Ptff.*

The *fi. fa.* bears date 24 May, 1839. Entry “no property,” January 16th, 1840. “No property of Bates,” Sept. 21st, 1846.

Scire facias to revive the judgment, 28th August, 1856.

The defendants pleaded the foregoing receipt in full payment and satisfaction of the judgment and execution.

Upon the trial, plaintiff demurred to this plea, which demurrer the Court overruled, and plaintiff excepted.

Plaintiff then went forward and offered in evidence the original declaration, process, judgment, and *fi. fa.*, and the entries thereon, and closed.

Defendants offered the receipt of which the above is a copy. Counsel for plaintiff objected to its introduction as evidence of a full satisfaction of the judgment. The Court overruled the objection and let the receipt go to the jury, and plaintiff excepted.

The plaintiff, in reply, called *A. K. Ayer*, one of the defendants, who testified, that he settled with Brown the half of said *fi. fa.*; the settlement took place in Col. Holt's office; that he (Ayer) wrote the body of the receipt; Bates was not present; plaintiff said at the time he should proceed and make the other half out of Bates the best way he could; both himself (Ayer) and Bates were then broke. That plaintiff received what was paid to him as a full discharge of all his (Ayer's) liability on the judgment and *fi. fa.* Bates was then living in or near Columbus. That it was understood between him (Ayer) and Brown, at the time said receipt was given; that Brown was not to look to him (Ayer) any further upon said judgment, but was to make the other half out of Bates the best way he could. Bates was the security for him (Ayer) on appeal.

The testimony here closed, and the presiding Judge, amongst other things, charged the jury that, under this proof, the plaintiff was not entitled to recover. To which charge plaintiff excepted.

The jury found for the defendants. Whereupon, counsel for plaintiff tenders his bill of exceptions, and assigns for error the rulings and charges above excepted to.

L. T. DOWNING, for plaintiff in error.

WELLBORN, JOHNSON & SLOAN, *contra*.

By the Court.—McDONALD J., delivering the opinion.

The plaintiff is attempting to revive a dormant judgment against the defendants. The plea sets forth the defence fully. The evidence of the defendants supports the plea, and the reply of the plaintiff by proof, presents matter of evidence on which he relies to defeat the effect of the plea. The plaintiff insisting that the plea was insufficient in law to bar the plaintiff's action, demurred to it. The Court below overruled the demurrer, and the judgment on the demurrer is excepted to and assigned as error.

The parties proceeded to trial, and after the evidence was heard, the presiding Judge charged the Jury that, under the proof, the plaintiff was not entitled to recover. The plaintiff's counsel excepted to the charge and assigned error thereon.

[1.] In determining the points presented in the record, it will be necessary to construe the contract of the parties. The plaintiff recovered, on the first trial of the action of trover, twelve hundred dollars, which might be discharged by the delivery of the negro sued for, and three hundred dollars for hire. From that verdict the defendant appealed, and gave Asa Bates as security. Ayer was the sole defendant in the action of trover. An appeal would give him a new trial, to which he was entitled, as a matter of right, on his paying costs and giving security for the eventual condemnation money. Bates was the security. To use terms applied to such cases in the French law, the principal obligation was Ayer's, and that of Bates was accessory to it. The entire

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obligation was therefore Ayer's. The obligation of Bates was for the whole or part, according to circumstances. If Ayer paid no part, and could pay no part, Bates was bound to pay the whole, and Ayer became bound to him for the whole amount on his payment of it. If Ayer paid a part, but could not pay the whole, Bates was bound to pay the part unpaid by him, and he became liable to Bates for that part on his (Bates') payment of it. Bates did not and could not become liable to Ayer for the part paid by him. Although the obligation was joint and several as to the plaintiff, and he was entitled to an execution against one or both at his option, still the relation of principal and surety subsisted between the defendants, and the plaintiff was bound to regard it in his dealings with them. The principle of contribution did not apply, for if Ayer had paid the whole, he could not call on Bates to respond for any part, while, if Bates had paid, he had a right to demand of Ayer all he paid. Hence, it follows, that the whole and every part of the obligation was Ayer's; he could not avoid its payment either to the plaintiff or to Bates. This is the construction of the contract.

[2.] We will now proceed to consider the effect of the payment made by A. K. Ayer, the principal. The plaintiff, as evidenced by the receipt, received of him, naming him as principal, the amount of one-half of the *fi. fa.*, his part *in full* of said *fi. fa.* If his part was the whole of said *fi. fa.*, and the plaintiff received one-half *in full* of his part thereof, it was a receipt of one-half *in full* of the whole. Now, if the plaintiff is not at liberty to treat this arrangement as a nude fact, he cannot proceed to collect the balance claimed by him, and the judgment must be considered as satisfied, and cannot be revived.

[3.] The case of *Fitch vs. Sutton* was cited by plaintiff's counsel in support of his position, that the acceptance of half of the judgment cannot, in law, be a satisfaction of the whole, and that case supports him. The Court held that there must

be some consideration for the relinquishment of the residue. The Judge who tried the cause at the Assizes, directed the jury to find for the defendant. He was of opinion that, upon principle, the settlement made by the parties was valid and binding. If the statement of the case be correct, it is to be inferred from it, that the 7s. in the pound for which the debtor compounded with his creditors, was paid at the time. That it was an executed contract. It seems, that in the case relied on as authority to support it, *Cumber vs. Ware*, to which I have not access, the defendant pleaded the acceptance by the plaintiff of a security for a *lesser sum* in satisfaction of a *similar security* for a greater. An action at law cannot be supported by a *nudum pactum*. That is clear. If the defendant could not have sustained an action on the subject matter of his plea, it being an executory contract, he would not avail himself of it as a defence, for the plaintiff, by replying a want of consideration, would, as to the plea, convert the defendant into a plaintiff. 2 *Durn. and East*, 24.

The case of *Heathcote vs. Crookshanks* is not an authority for *Fitch vs. Sutton*. There the debtor compounded with his creditors, and agreed to pay a less sum for a greater, which the creditors agreed to accept, the same to be paid in a reasonable time. When the debtor offered to pay subsequently, and, as he averred, in a reasonable time, the creditor refused to accept the smaller sum, and by his plea the defendant asks to be permitted to enforce the agreement. The Court says he cannot do it because it is a *nudum pactum*. There is no consideration for it. In delivering his opinion, Ashurst, Justice says: "It is true, that if A. promise to give B. £15 and he actually pays it, he cannot recover it back again; but here the question is, whether an agreement by the plaintiff to take a less sum is obligatory without acceptance. It is said that a tender is, in all cases, equivalent to a payment; but that is not so; for if a tender be pleaded in bar of a promise, it is not taken as a payment, but as a bar to the action. This

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agreement is not binding in law, and the plaintiff is always entitled to the whole demand. And, therefore, as this *agreement has not been followed up by an actual acceptance, which is negatived by the record, it was not obligatory.*" Justice Buller remarked in the same case: "It was said that all the creditors were bound by this agreement to forbear; but that is not stated by the plea. It is only alleged that they agreed to take a certain proportion; but that is *nudum pactum, unless they had afterwards accepted it.*" It follows, that if the plaintiff had accepted the smaller sum when tendered, he would have been bound by it.

In the case of *Alver vs. George*, 1st *Campbell's Rep.*, 392, the defendant gave in evidence a receipt in full of all demands. Against this defence it was proposed to prove that before the date of the receipt, the plaintiff had assigned the whole of his effects for the benefit of his creditors; that the defendant had full notice of the assignment; that in reality no money passed upon the giving of the receipt; that the whole was a collusion between them to cheat the creditors; that the action was brought in the name of the plaintiff by the trustees, in behalf of themselves and other creditors. Lord Ellenborough, who delivered the opinion in *Fitch vs. Sutton*, said in this case: "Sitting here, I can only look to the strict legal rights of the parties on the record; and there can be no doubt that a receipt in full, where the person who gave it was under no misapprehension, and can complain of no fraud or imposition, is binding upon him." In the case before us, the money was paid, the receipt was given, the transaction was closed. It was an executed contract. There was no fraud or imposition, and the parties did what they intended to do. There was no misapprehension. If it be said that the plaintiff received half of the amount only, and that he did not intend a full satisfaction as to both defendants; yet if his writing discharges both he must be bound, for he is presumed to know the legal effect of the instrument he signed. *Lewis vs. Jones*, 4 *Barn and Cress*. 506.

[4.] There is no reservation of the right, in the receipt, to collect the balance of the debt from the surety. The parties, so to speak, were dealing at arms length. It does not appear that the defendant Ayer would have paid one-half, with such reservation in the writing. It seems that he and his surety were both insolvent at the time, and he must have been dependant on the aid of a friend for the means of paying the one-half, and it is not probable he would, at the very time he expected to be relieved from the payment of half the judgment, stipulate for his continued ultimate liability to his surety for that half, whatever he may have said at the time. He must be supposed to have understood the legal effect of the receipt which the plaintiff signed, that when it discharged him as principal, it discharged his surety also, without an express saving in the receipt to the contrary. The plaintiff knew that Ayer was principal, and that Bates was surety. He ought to have known, that to release him absolutely, without reserving in the instrument of release the right to go against the security, the security would be also discharged.

But to pass to the evidence given by the plaintiff who examined the defendant Ayer. He testified that he settled with the plaintiff the half of said *fi. fa.*, as specified in the receipt. The defendant Bates was not present. The plaintiff remarked at the time that he should proceed to make the other half out of Bates the best way he could. It was understood between them, at the time of the payment and the giving the receipt, that the plaintiff was not to look to Ayer any further on said judgment or *fi. fa.*, but was to make the other half out of Bates the best way he could. He was security on the appeal. The plaintiff received and accepted what was paid by witness Ayer, in discharge of all his (Ayer's) liability to the plaintiff on the judgment or *fi. fa.* The testimony then shows that the defendant Ayer paid the plaintiff one-half of the amount of the debt, which he received and accepted in discharge of *all his liability* on the judgment and *fi. fa.* Here was a clear discharge of Ayer by the

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payment and acceptance of a sum agreed upon. The contract was executed by the payment of the money, and by the giving of the receipt. If it be true that the debt may be satisfied in this way, the judgment against Ayer, who was principal, was extinguished. "Whenever the principal is discharged, in whatever manner it may be, not only by actual payment or compensation, but also by a release, the surety is discharged likewise; for the essence of the obligation being that the surety is only obliged on behalf of the principal debtor, he therefore is no longer obliged, when there is no longer any principal debtor for whom he is obliged." 1 *Pothier*, 209. Bates was bound for Ayer and not otherwise. Ayer is no longer bound, by reason of his discharge, and Bates, the surety, being only bound for him, cannot be held bound after his liability ceases. When the principal obligation is extinguished, the accessory obligation, which can have no existence without it, becomes extinct also.

This Court, in the case of *Rankin vs. Tarver*, 3 *Kelly*, 210, decided that when two judgments had been obtained on the same debt, one in Alabama, and the other in Georgia, the satisfaction of the judgment in Alabama by the payment of a sum much less than the amount due, although the receipt which was offered in evidence in proof of satisfaction, stated that the money was received "*in compromise of the judgment, but not to affect any other*," may be shown, and when proven, should be held to be satisfaction of the judgment in Georgia. That is a strong authority in support of the principle contended for by the defendant in error here, and goes beyond what is necessary to sustain the judgment of the Court below in this case.

• Judgment affirmed.

JAMES THOMPSON, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

- [1.] When a prisoner charged with the crime of murder, applies for a continuance, he must make a strict and special showing, and it must appear that the absent person whose testimony he professes to want, is in fact a witness, to some matter necessary to his defence, and if he knows of this, from information only, he ought to submit the affidavit of his informant.
- [2.] Public excitement not sufficient ground to entitle a prisoner accused of felony to a continuance, since the passage of the Act of 1856, in relation to the empannelling of jurors.
- [3.] A question may be asked a prisoner, who has made a showing in writing for a continuance, which is intended merely to enable the Court to procure the attendance of a person as a witness, on account of whose absence he was proposing to continue the cause.
- [4.] The formation and expression of an opinion, *from report*, as to the guilt or innocence of a prisoner, does not disqualify a person from serving on his trial, as a juror.
- [5.] Declarations of a person made *in extremis*, and at the point of death, when he had no hope of recovery, admissible as dying declarations.
- [6.] The terms in the Statute "serious personal injury on the person killing" means a bodily injury, and not a personal affront—or a personal wrong.

Murder, from Muscogee county. Tried before Judge WORRILL, at November Term, 1857.

James Thompson was indicted for the murder of John Calhoun.

The case being called, the Solicitor General announced ready for the State. The prisoner's counsel moved for a continuance, on the grounds:

1st. That the crime of which he was charged having been recently committed (but a few days before,) he had not been able to prepare his defence.

2d. That a witness whose testimony was material to his defence was absent.

3d. That the public mind was so excited against prisoner that he could not safely go to trial at this time.

The motion for a continuance was overruled by the Court, and prisoner's counsel excepted.

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In selecting a jury, Frank Bracken, being called, was asked by the Solicitor General "whether from having seen the crime committed, or from having heard any part of the evidence under oath, he had formed or expressed any opinion relative to the guilt or innocence of the prisoner at the bar?" Bracken replied, "I have:" The Solicitor General then by permission of the Court, counsel for the prisoner objecting, asked Bracken whether he had seen the crime committed, he replied, "no." Solicitor General then asked him if he had heard any part of the evidence under oath, he replied, "no," but that he had formed his opinion from report. The Solicitor General then propounded the other questions required by the statute. Counsel for prisoner proved by the Solicitor General, that he had heard Bracken declare that he had formed or expressed an opinion as to the guilt or innocence of the accused. The Court pronounced the juror competent, and prisoner's counsel excepted.

Evidence for the State.

George Morman, sworn, says: Deceased and witness went to Jane Wardsworth's together; when they got there, found four or five men there; these men remained about half an hour and then left. After they left, deceased and Barbara Playmile went off into a room together; deceased asked witness to wait for him and not leave him. Witness remained in the room about three quarters of an hour; got tired waiting and thought he would go home; went to the room where deceased was, and knocked; deceased asked if it was witness; witness replied that it was, and said to deceased come let's go; remained there a few moments, when prisoner and Guilford knocked at the door; they came in the house; prisoner with his knife open in his hand; they passed witness, and prisoner pushed open the door of the room where deceased was in; prisoner and Guilford walked in, and witness walked in after them; prisoner gathered the girl Barbara round the waist and said, this is too sweet for niggers—prisoner re-

mained in the room a few minutes, and pulled out a bill and said he would bet ten dollars that he could whip any God damn son of a bitch in the house. Calhoun then said he would bet twenty-five dollars that nobody in the house could whip him, and stamped on the floor; prisoner threw his hand on the bureau with the bill in it, and said he would or could whip deceased, and at once gathered him by the collar and shook him a little; the knife was still in prisoner's hand, opened. Calhoun said to prisoner, "if you attempt to stick me with that knife, I'll blow a hole through you," and then put his hand behind him. Prisoner then shook Calhoun by the collar and said God dam you, I am not afraid of you, and flourished his knife around. Witness took hold of prisoner by the wrist and said, Jim behave yourself; prisoner then said to witness, if you dont turn me loose I'll cut you. Prisoner still had Calhoun by the collar and flourishing his knife about. Prisoner struck Calhoun in the face, either with the flat side of the knife or with his hand, and Calhoun then struck prisoner. After Calhoun struck prisoner, they closed together, swept out of the room which was the last witness saw of them together. Guilford went out of the door with them, and as they went out, he either struck or kicked at one of them. Witness thinks Guilford kicked at Calhoun; never heard anything after they went out. After prisoner came back into the house, he asked witness if he saw him cut Calhoun. Witness replied "no,"—so thinks; prisoner said he cut him pretty damn badly, and showed the knife to witness and Jane Wardsworth. Witness then left the house, went off to hunt deceased; did not see deceased again till the Coroner's inquest. This took place on the 4th December, 1857, at Jane Wardsworth's in the county of Muscogee. Witness don't know that prisoner had any thing particularly to do with Barbara Playmile; he went to see her occasionally, and was in love with her. Believes the knife here shown to witness, to be the knife used as stated; only saw the blade at the time; had seen the knife before.



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Matilda Wilson, for the State, swears: That she saw one lick through the bottom of the window. Calhoun came there (to Jane Wardsworth,) with George Morman. He was in the room with this girl at the time Thompson came in. Morman was in the hall; prisoner knocked at the door and Morman let him in; prisoner went in and commenced talking to Barbara Playmile; prisoner turned round and said, "hell, Calhoun, you here;" asked Calhoun what was the news; Calhoun said "none at all I believe." Deceased then asked, "what's the news with you, Mr. Thompson." Thompson replied, "none—I'm drunk." Jim Guilford, prisoner and Calhoun, went out of the room together. Witness did not see any lick nor any person attempt to strike—saw one lick after they had gone out of the door. As Calhoun started to run towards the gate, the lick was struck by prisoner on Calhoun with his fist. After they had gone out, witness heard Calhoun say "do pray if I have got any friends, take the knife away from him." Witness never heard anything more like blows or fighting. They were out of the door about fifteen or twenty minutes; prisoner came in the house into my room and said "Matilda, I have cut him and will cut him again," and showed witness a knife with blood on it. [A knife shown to witness.] This is the knife which did the cutting. This took place between eleven and twelve o'clock last Friday in this county. Deceased did not come back into the house. Prisoner said that deceased "broke and run as soon as he quit him."

John Duncan for the State, swears: He saw Calhoun the night he was cut; deceased asked witness to go after the doctor; he appeared to be feeble and short of breath, leaned on witness; witness saw that he was cut; saw three wounds on him; one on his left side, one on his breast and another wound. This was on Friday night last.

Dr. Carriger, for the State, swears: That he was called to see deceased last Friday night; deceased was very faint from the loss of blood; breathed with difficulty; one wound in

the side, one in the small of the back, several on the head, and elsewhere; his opinion was that deceased would live but a little while; never told him that night that he would die. Deceased told witness he wished to bid him farewell, that he was dying; witness tried to cheer him up; the severest wounds were one in the stomach and one in the left side, at the junction of second rib with back bone. Witness thinks the wounds mentioned in all probability would result in death; attended him till his death, which took place at eleven o'clock on Sunday; he died of the wounds. Witness found deceased at Mr. McMichael's, near the gas works.

Wm. McMichael, for the State, swears: That on last Friday night while in bed, somebody knocked at the door; thought he knew the voice at the door—and deceased came to house of witness—the doctor said that there was no chance for him; that he was obliged to die; there was no chance for him; deceased was very faint; had some four or five wounds on him; was very bloody when he came to house of witness, he staggered and fell against the bed, and would have fallen over had he not supported him. Witness said to him, how could a man hold you and cut you so? Deceased said that Guilford held him and prisoner cut him; he begged witness to get a doctor for him, and do all he could for him, that he was bound to die. When deceased came to witness' house it was about 11 o'clock on Friday night last; said he had been cut at the house of Jane Wardsworth in this city—said that Guilford and prisoner pulled him out of the door.

Cross-Examined—Deceased said he was in the yard and not in the house. At the time he made this declaration to witness, deceased did not use any harsh words about prisoner, nor say anything against him; did not ask witness to send for a preacher or express any desire to live on, previous to making the declaration. The knife identified by witness, was a spring back dirk knife, the blade about four inches long.

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Counsel for prisoner objected to the statements or declarations of deceased, and moved that they be excluded.

The Court overruled the objection and admitted them as dying declarations, and counsel excepted.

The State closed.

The prisoner introduced no testimony.

The Court amongst other things, charged the jury "that they must believe from the testimony that there was some assault by the deceased on the prisoner, or an attempt by him to commit serious *bodily* injury on the prisoner, to constitute the crime voluntary manslaughter."

To which charge prisoner excepted.

The jury found the prisoner guilty; whereupon his counsel moved for a new trial on the grounds of error in all the rulings and charges above excepted to, and because the verdict was contrary to law and the evidence, which motion for new trial was overruled by the Court and counsel for prisoner excepted.

JNO. A. JONES and J. J. SLADE, for plaintiff in error

Sol. Gen'l. OLIVER, for the State.

By the Court.—McDONALD, J. delivering the opinion.

The prisoner on his conviction, moved the Court below for a new trial, and in the motion embraced all the decisions and rulings of the Court prior to and during the progress of the trial. The Court overruled the motion and the prisoner excepted.

[1.] The first ground of the motion is the alleged error of the Court in refusing the continuance of the cause. In crimes of the grade of that charged against the prisoner, motions for continuance must be strict and special. It is

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not sufficient for him to say that he has not been able to take steps towards preparation for his defence. It should appear in what respect he has not been able to prepare, as that he has witnesses; what he expects to prove by them; the ground of his expectation; who they are, and that he has not, on application, had an opportunity afforded him to procure their attendance. The defendant deposes that until the bill was returned into Court he was unadvised as to the nature of the offence which would be charged against him. He knew he would be charged with homicide, and it was his duty to prepare for the grade of homicide which would constitute the highest offence against the laws. It does not appear that he had a witness who could prove any material fact. He gives the name of George Spivey, but it does not appear, with sufficient distinctness, that Spivey knows a single fact. The prisoner stated that he was informed and believed that Spivey would prove certain facts, set forth in the affidavit. He does not even give the name of his informant, when he should have submitted his affidavit, with proof by himself or others, that Spivey was present at the time the act charged upon the prisoner was committed.

[2.] That the public mind was excited against the prisoner by the act, is no cause of itself for putting off the trial. It ought ever to be remembered, in discussing a point like this, that, such is the benignity of the law, the jury are always instructed by the Court, that if a reasonable doubt rests upon their mind of the guilt of the prisoner, they should acquit him; and further, that the Court will not, in cases of conviction of a prisoner charged with a capital offence, allow a verdict to stand which could have been rendered by a prejudiced jury only. Prior to the Act of 1856, in relation to the qualification of jurors to serve on the trial of persons charged with felonies, this Court had inclined to listen favorably to applications of this sort. Since that time, it is impossible that a party on his trial for such an offence, if he choose to avail himself of all his legal rights, can have an

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unfair trial, unless it be by the perjury of persons put upon him as jurors, or the palpable misconduct of the officers of the law. In this last respect, he is as much liable to imposition and wrong in times free from excitement, as when there is an inflamed state of the public mind. The prisoner is not bound to have as a juror, a person who from having seen the crime committed has formed or expressed any opinion as to his guilt or innocence; or who has any prejudice or bias resting upon his mind against him; or who is not perfectly impartial between the State and himself. We think that the laws fully protect and guard the rights of persons accused of the higher grade of crimes, by wisely providing for them an impartial trial; giving them the benefit of any reasonable doubt of guilt left on the mind of the jury by the evidence; and, ultimately, by entitling them to a new trial if the verdict be against the evidence, the law, or justice of their case.

[3.] The record in this case shows that the question put to the prisoner by the Solicitor General, as to the source of his information in regard to Spivey, was not intended to counteract the effect of the written showing made by the prisoner for the continuance of his cause, but to enable the Court to have the witness produced at the trial for his benefit, if possible; and that the decision of the Court in regard to the continuance was not placed upon evidence elicited by the question of the Solicitor.

[4.] The formation and expression of an opinion relative to the guilt or innocence of a prisoner from report, does not disqualify a person from serving as a juror on his trial.

[5.] The evidence shows that the declarations of deceased given in evidence against the prisoner were made when he was in extremity, in the apprehension of death, and when all hope of recovery was gone, and the deceased at the point of death. These declarations were evidence, and properly admitted by the Court.

[6.] There is no error in the charge of the Court to the

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jury that they must believe from the testimony that there was some assault by the deceased on the prisoner, or an attempt by the deceased to commit a serious bodily injury on him, the prisoner, to constitute the crime of voluntary manslaughter. If a charge be not in the very words of the statute, if it be not contrary thereto, it is legal. The terms of the act "to commit a serious personal injury on the person killing," means a bodily injury, and not a personal affront, or a personal wrong. It must be an injury that may deprive of life, and which must be prevented by a resistance of the like sort.

Without going through the evidence in this case, it is sufficient to say that the finding of the jury is abundantly supported by the testimony, and that the conduct and act of the prisoner in taking the life of deceased, show an abandoned and malignant heart, which fix upon him the crime and guilt of murder.

Judgment affirmed.

ROBERT S. HARDAWAY, plaintiff in error, vs. P. J. SEMMES, defendant in error.

If a mortgagee does not record his mortgage in three months, he risks having it postponed, to after-made mortgages, and to judgments obtained before he has foreclosed it; but this is all he risks.

Garnishment, from Muscogee county. Decided by Judge WORRILL, November Term, 1857.

A summons of garnishment was issued, in an action brought by Robert S. Hardaway against Edward T. Taylor, directed to Paul J. Semmes. Semmes answered, and upon the hear-

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ing, the plaintiff introduced as a witness, the garnishee, Semmes, who testified that Taylor had deposited in his hands, as agent of the State Bank, collateral security for a debt due from him to the bank, which he turned over to the bank before the service of the summons of garnishment. That he had also previously to the service of the said summons, (which was admitted to have been made on the 14th day of November, 1856,) taken from Taylor two mortgages, one on his house and lot, and the other on two negroes. Could not remember the dates of the mortgages, nor whether they were made to him (in the wording of them) individually, or as the agent of the bank. On being shown one of the mortgages, he testified that it was given in September, 1856. Both the mortgages were given him on the same day, and in the wording of them, to him individually, but really as agent of the bank, and that though they were so given, he had no interest in them, but they were given to secure a debt due to the bank. These mortgages were in his hands, but since that time had been foreclosed, and he had received, as agent of the bank, and appropriated to the payment of the debt of the bank, from the sale of one of the negroes, about \$1,000, and that the proceeds of the sale of the other property was held up in the Sheriff's hands by the plaintiff's attorneys; could not remember how many mortgages, or the dates of them, he had taken from Taylor, but he thought he had taken two others in each case, and when he took the first the understanding between himself and Taylor was, that the mortgages should not be recorded just then, but that Taylor should renew them or give new ones when the time, limited by law for the recording of mortgages, expired. There was the same understanding when the second mortgage was given, and also when the third and those he held were given, and upon one of which he had received \$1,000. That the other two mortgages had not been recorded, and the third only after Taylor ran away, but within three months from its execution. According to his recollection, the time for recording had

elapsed in each of the two preceding mortgages before the succeeding ones were given. That notwithstanding the understanding between himself and Taylor, he did not consider it a binding contract against him, but only a request to which he assented, and as a matter of courtesy, promised Taylor not to record them, but said he should reserve the right to do so if he thought it prudent. That at the time of the service of the summons of garnishment, he was not indebted to Taylor, nor had he any effects or property of any kind belonging to him.

After argument, the Court proceeded to charge the jury, that if they believed from the evidence that Dr. Taylor was indebted to the bank, and gave to the garnishee, as agent of the bank, and to secure a debt due to it, the mortgage testified to, and that when the first mortgage was given it was the understanding between the garnishee and Taylor that it should not be recorded, and that before the time elapsed he (Taylor) would give another mortgage on the same property to secure the same debt, and that the mortgage was not therefore recorded, and that a second mortgage was given in pursuance of that agreement, and at that time a similar understanding was entered into as to that mortgage and carried out, and a third given in pursuance thereof, and a similar understanding in regard to that; and they should further believe that the latter mortgage was recorded within the three months after its execution, and that the garnishee received the \$1,000 or any other sum, as agent of the bank, and paid it over to the bank on the last mortgage; that he was entitled to hold it, and that it was not the money of the defendant Taylor, and that that was the only issue they had to try: the counsel for plaintiff, Hardaway, averring to the Court, at the time, that he only contended for the \$1,000 received on the mortgages, and in the course of his argument to the jury, and at the conclusion thereof, disclaimed all other demands.

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Plaintiff's counsel requested the Court to charge the jury, that if they believed that there was an understanding between Semmes and Taylor, at the time the mortgages were given on the two negroes, as testified to by witness, that the mortgagee should withhold the mortgage from record, and that the mortgagor should give another mortgage before the time, required by law that mortgages on personal property should be recorded, expired; and that the mortgage was not recorded; that the mortgage was void as to creditors, and had no lien on the property as between the mortgagee and Taylor's creditors.

Plaintiff's counsel also requested^d the Court to charge the jury, that if they should believe that the mortgage under which the money was received by Semmes, was made to Semmes individually, and that at the time Semmes received the money Taylor did not owe him any thing, the money so received was still the money of Taylor. That if they believed that the garnishee had become indebted to Taylor, or obtained any of his property or effects since the summons of garnishment, that he was answerable for the same as if he had received it before, and had it at the time of the service—the plaintiff's counsel offering at the same time to amend the traverse so as to include it.

The Court refused to give these charges, and to the refusal of the Court to charge as requested, and to the charges given by the Court, the plaintiffs counsel excepted, and assigned the same as error.

DOUGHERTY, for plaintiff in error.

HOLT & HUTCHINS; WELLBORN, JOHNSON & SLOAN, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

The only law subjecting a mortgagee to any risk, for not recording his mortgage in three months, is that contained in

the fourth section of the Act of 1827, entitled, "an Act to provide for the recording of deeds of mortgage," &c. That section is in the following words: "Upon failure to record any mortgage as hereinbefore required, within the time or times hereinbefore specified for recording the same, that then and in such case, all judgments obtained before the foreclosure of the said mortgage, and also any mortgage executed after the same, and duly recorded, shall take lien on the said mortgaged property, in preference to the said mortgage." *Pr. Dig.* 166.

This law does not subject a mortgagee to any loss in such a case as the present. The garnishing creditor in the present case, did not obtain his judgment, (if at all,) "before the foreclosure" of the mortgage; he was not the holder of a mortgage "executed after" this mortgage. His case is not within the law.

Indeed, it does not appear, that he gave credit in consequence of the non-registration of the mortgages. It does not appear that he ever searched the records. His debt may have been older than the oldest of the three mortgages.

Nothing in the common law required, or even encouraged, a mortgagee to record his mortgage.

We see nothing erroneous in the decisions excepted to.

There does not seem to have been any thing in the evidence, to authorize the last request.

Judgment affirmed.

Chamberlain & Bancroft vs. Stone.

CHAMBERLAIN & BANCROFT, plaintiffs in error, vs. **O. M. STONE**, defendant in error.

[1.] The holders of a partnership note given for a bill of goods, renewed it with one of the partners, extending the day of payment, after the dissolution of the partnership, and without the knowledge of the other partner.

Held, That this discharged the other partner.

[2.] The holders of a partnership note, after the dissolution of the partnership, renewed the note with one partner, without the consent of the other, extending the day of payment, and thus discharged the other partner. Afterwards, he, with a knowledge of the facts, agreed to pay the note.

Held, That he was bound by his promise.

Assumpsit, from Muscogee county. Tried before Judge **WORRILL**, November Term, 1857.

This was an action brought by the plaintiffs in error, on a note which was given in renewal of a note for \$1,423 33, of the 24th of February, 1851.

In February, 1851, the plaintiffs, who were partners, sold goods to the firm of Stone & Johnson, to the value of \$1,423 33, for which amount they gave the firm note, payable six months after date. Before the note became due the firm of Stone & Johnson was dissolved. When the note was presented for payment, Johnson gave a note signed in the name of the firm, as a renewal of the former note.

Upon this latter note the plaintiffs in error brought an action against Osborne M. Stone, and at the trial proved by Daniel Miler, that the note sued on was written by himself, and signed by Johnson with the name of the firm, and that no one was present at the time but himself and Johnson, and that the original note of the 24th of February, 1851, was given up to Johnson, and that the goods for which it was given had never been paid for. That he had a conversation with Stone about the note sued on, at Columbus, Georgia, in January, 1853, when Stone promised to pay the note, asked indulgence and begged not to be sued upon it; this indulgence witness, as the agent of the plaintiffs, granted, and advised

Stone to get enough of the assets of the firm to secure himself from ultimate loss. Stone said he had the means of paying and would pay the note. That at the time the note sued on was given, the partnership of Stone & Johnson was dissolved, and that he and the plaintiffs knew of that dissolution.

Plaintiffs also proved by Alexander Isaacs, that the note was written by Miler, but signed with the firm name by Johnson; that he was at Columbus in December, 1853, and January, 1854, and at that time had a conversation with Stone in regard to the note, and that he showed the note to Stone and demanded payment of the same; that Stone refused, and said he would not pay the note unless compelled by law; that witness told Stone that he (Stone) had previously promised Miler to pay the note, which promise Stone admitted, but said that after the promise he had consulted some one who informed him that he was not bound to pay the note, because Johnson had signed it with the firm name after the dissolution; that Stone admitted the justice of the debt, and that the firm had received value for which the original note was given.

Defendant proved by William Hudson, the formation of the partnership between himself and Johnson; that he (defendant) had sold out; that Johnson became insolvent and afterwards died. He also proved by the answers of plaintiffs, that they had notice of the dissolution of the partnership at the time the note sued on was given.

Upon the conclusion of the argument, the Court charged the jury as follows:

1st. If you believe from the evidence that the note sued on was given in renewal of the original note of Stone & Johnson after the firm was dissolved, and if you believe plaintiffs at the time knew of said dissolution, and if it was done by Johnson alone, without the knowledge and consent

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of Stone, then Stone is discharged from all liability, both upon the note sued and also upon the original bill of goods.

2d. But if from all the facts and circumstances proven on the trial, you believe that Stone knew the fact that the note was renewed at the time it was done, and gave his assent to it, then, although it was done by Johnson alone, and after the dissolution, Stone was bound by it, and they would find for the plaintiffs the amount of the note with interest and costs of suit.

3d. But if the jury believe from the testimony, that the note sued on was given in renewal by Johnson alone, and without the knowledge and consent of Stone, and after the dissolution, and if plaintiffs knew of the dissolution at that time, then the subsequent promise of Stone to pay would not be binding on him.

The counsel for the plaintiffs then requested the Court in writing, to charge the jury as follows :

1st. If you believe from the evidence that the note sued on was given in renewal of the original note of Stone & Johnson, and after the dissolution of the firm, and after plaintiffs knew of the dissolution, and though done by Johnson alone, without the knowledge or consent of Stone, still Stone would not be discharged from his liability on the original bill of goods, unless the jury should believe it had been proven that at the time plaintiffs renewed the note with Johnson it was expressly stipulated and agreed that the renewal note should be taken as a payment and extinguishment of the original indebtedness.

2d. And further, that if the jury should believe that when Miler, the clerk and agent of the plaintiffs, renewed the note with Johnson, nothing else took place than that the note was renewed by Johnson alone, without the knowledge or consent of Stone, and after the dissolution of the firm, and after this dissolution was known to plaintiffs, that that alone would not be sufficient to discharge Stone from his liability for the

original bill of goods, but in order to discharge him, it must further appear from the proof, that the plaintiffs at that time, expressly stipulated and agreed to take the renewed note in payment and discharge of the debt, and if this had not been proven, they must find for the plaintiffs on the original bill of goods.

3d. If the jury believe from the evidence that Johnson, without any direct authority from Stone, signed the firm name to the note sued on, after the dissolution of the firm, and after this dissolution was known to plaintiffs, yet, if they believe from the evidence that Stone sanctioned and adopted the act of Johnson, the plaintiffs are entitled to recover.

4th. If the jury believe from the evidence that Johnson, without any authority from Stone, signed the firm name to the note sued on, after the dissolution of the firm, and after this was known to the plaintiffs, yet, if they believe from the evidence that Stone subsequently, with a full knowledge of all the facts, ratified the act of Johnson, the plaintiffs are entitled to recover.

5th. If the jury believe from the evidence that Johnson, without the authority of Stone, signed the firm name to the note sued on, after the dissolution of the firm, and after this fact was known to plaintiffs, yet, if they believe from the evidence that Stone subsequently, with a full knowledge of the facts, promised to pay the note sued on, the plaintiffs are entitled to recover.

The Court refused to give these charges as requested. The jury found for the defendant, and the plaintiffs excepted, assigning as error the charges given by the Court, and the refusal of the Court to give each and every of the said charges as requested.

JOHNSON & SLOAN, for plaintiffs in error.

INGRAM, *contra*.

By the Court.—BENNING, J. delivering the opinion.

What is contained in the first paragraph of the charge, is right.

[1.] The taking of the new note by the plaintiff was, at least, a *suspension* of their right to demand payment of the *debt*, until the new note fell due; and, therefore, the effect was, to put the debt in such a condition that Stone would no longer have the right, to pay it up immediately, and demand contribution from Johnson, but would have to wait till the note fell due, before he could pay it up, and demand this contribution. An arrangement or agreement between the plaintiffs and Johnson, having such an effect as this, was sufficient to discharge Stone. So it was held by this Court, in this case, when the case was up before. 20 Ga. 262.

What is thus said of this part of the charge, disposes also, of the first and second requests to charge.

The second paragraph of the charge, is certainly good as far as it goes.

The third paragraph of the charge, seems to us to be erroneous.

[2.] A subsequent ratification, with a knowledge of the facts, will make good the act even of one who is not agent; a subsequent promise, with knowledge of the facts, will revive a debt barred by the statute of limitations, a debt barred by bankrupt laws, a debt from which the endorser has been discharged, by the negligence of the holder.

The decisions that support these positions are now too numerous, and of too long standing, to be resisted, although they are it must be admitted, in the very teeth of the great common law maxim, that a contract without consideration, is not binding.

What is thus said of this part of the charge disposes also, of the third fourth and fifth requests.

There ought to be a new trial.

Judgment reversed.

Guilford vs. The State.

JAMES GUILFORD, plaintiff in error, vs. **THE STATE OF GEORGIA**, defendant in error.

T. & C. were engaged in a fight in which, T. stabbed C. to death. G. interfered by laying hold of C. The evidence was such, as to raise a reasonable doubt, whether G's object in this was not rather, to separate T. & C., than to aid T. The jury found G. guilty of murder.

Held, That the verdict was contrary to the evidence.

Murder, from Muscogee county. Tried before Judge **WORRILL**, November Term, 1857.

The bill of exceptions in this case was filed, alleging error in the decision of the Court below in refusing a new trial under the following circumstances.

James Guilford the plaintiff in error, was indicted for murder, and on the case coming on for trial in November Term, 1857, prisoner's counsel moved for a continuance, grounding his application on an affidavit made by the prisoner, that he could not go safely to trial, as the alleged crime was committed during the then term of the Court, and that the public excitement was such that he feared he could not obtain a fair trial.

The Court overruled the showing for a continuance and the prisoner excepted.

The parties then proceeded to select and empanel a jury, and while doing so, Stephen D. Lewis was called and sworn by the Solicitor General, and asked the questions prescribed by the Statute, which questions Lewis so answered as to make himself a competent juror. Prisoner's counsel then proposed to ask him "whether or not he (Lewis) had not said to the counsel for the prisoner on the morning of the trial, in the court room, that the prisoner was guilty, and ought to be hung." The Court refused to allow the question to be put, deciding that when a juror had qualified himself under the statute it was not competent for the prisoner to

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disqualify the juror by his (the juror's) own oath; and to this decision the prisoner excepted.

The following witnesses were examined on the part of the State:

George Morman testified: That he and deceased went to Jane Wardsworth's, there were some four or five countrymen there, they stayed there about three-quarters of an hour. Witness got up and went and knocked at the door, they both asked if that was witness: he replied yes, and told deceased to come and go, and said he was going. Deceased asked witness to wait and not leave him. In a minute or two, Thompson and the prisoner at the bar came there and knocked at the back door, and came in together—Thompson with his knife open, and walked by witness and went to the room where deceased and Playmile were, and either pushed or knicked the door open, and after they got in Thompson hugged and kissed Miss Playmile, and said this is too sweet for niggers. Thompson turned round, pulled out a \$10 bill and said that he would bet it he could whip any God damned son of a bitch in the house. Deceased said he would bet \$25 no one in the house could whip him. Thompson showed his hand with the \$10 on the bureau, and said he would bet it; he could do it, and seized deceased by the coat collar, saying that God damn him, he was not scared of him (deceased,) and shook him awhile and flourished his knife around deceased. Witness caught Thompson and told him to behave himself. Thompson replied, if witness did not turn him loose, God damn him, he would cut him (witness,) and again caught deceased. Deceased said, if Thompson attempted to cut him with his knife, he would blow a ball through him. Thompson flourished his knife around the face of deceased and struck deceased in face with flat side of knife. Deceased then struck Thompson in the stomach or breast; they then closed together and pulled out in the entry, deceased trying to pull loose, and Thompson holding him, and in this

way they went out doors and into the back yard ; as they went out doors saw prisoner kick or knock deceased ; at Thompson and prisoner afterwards came in the house together ; Thompson asked if witness saw him cut him ; witness replied no ; he then said he had cut deceased God damned deep, and showed the knife which he then had in his hand open. Witness then left and came to Griffin's bar, and prisoner followed after him and came with him as far as the bar, and witness saw prisoner no more. All this was between 11 and 12 o'clock at night. Witness identifies the knife. All this was on the 4th December 1857, on Friday night. Guilford is older and stouter than deceased, who was about 21, and would weigh about 140 pounds.

Cross-Examined—Hardly ever saw Thompson without he had his knife. Prisoner had no weapon. 'Twas a dark night. Heard some one tell deceased and Thompson not to fight ; dont know who it was. Thinks prisoner cowardly ; not a fighting man. From seeing prisoner's arm, does not think he is strong in it. 'Twas a dark rainy night. Jane Wardsworth shoved deceased, prisoner, Thompson and Barbara, out of the house and closed and barred the door. Witness was excited and scared. Prisoner was then about half drunk. Thompson was drunk. Thompson loved Barbara.

Re-Examined—I thought it was Jane Wardsworth told them not to fight.

John B. Griffin, testified : On the night deceased was cut, Thompson and prisoner were at his house all the evening, both were drinking considerably about nine or ten at night.

Matilda Wilson, sworn, testified : That at the time of cutting, Mr. Morman, Jane Wardsworth, Barbara Playmile, herself and sister, were at Jane Wardsworth's ; Thompson knocked at the door, and Morman let them in, (prisoner and Thompson ;) Thompson commenced talking with Barbara Playmile, and turned round and said, "hallo, Calhoun, you here ; what's all the news ;" deceased said, "none at all. Deceased then asked Thompson the news, Thompson re-

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plied, "nothing, I'm drunk again." Thompson had a knife in his hand; heard nothing pass between them; they then went out the door together, to-wit: Thompson, prisoner and deceased; deceased seemed to be trying to get away. Deceased run after they got in the back yard, and witness saw through the bottom of the window Thompson strike him one lick. Prisoner was there standing by the side of Thompson. They were out of doors 15 or 20 minutes. Witness supposes Thompson and prisoner came back in the house together; while they were in the yard, Calhoun said, "gentlemen if I have got any friends, take the knife away from him."

Cross-Examined—Prisoner had no knife. Witness saw no blow by prisoner. Prisoner was drunk; he went off with Morman.

Barbara Playmile, deposed: On the night deceased was cut, he and Morman came to Jane Wardsworth's together; deceased asked if witness had a room, witness answered she had, and he asked witness to walk into her room that he wished to talk. They had been there three-quarters of an hour, when Thompson and the prisoner came. As they came in, deceased was in the act of leaving. Thompson commenced conversing with witness, and didn't take any notice of deceased for five or six minutes; he then turned and said "hallo, Calhoun, you here." Deceased said he was. Thompson asked deceased how he came on, and the news; deceased said he had no news. Deceased asked Thompson the news; he replied he had none, only he was drunk; and Thompson then turned back and began to talk with witness. Thompson then pulled out a \$10 bill, and asked witness if she did not want it. Witness said no, and told him to put it back. Thompson put it back, and began to talk with witness. Thompson then pulled out the bill and said he would bet it, that no man who had anything against him could whip him. Deceased pulled out \$5 and threw it by Thompson's \$10, and said that he would bet five

to ten, that no man could whip him, and that the first man who struck or drew a knife on him, he would blow a daylight hole through him. Deceased run his hand under his coat, as if to draw a pistol, and Thompson run up and caught him by the collar. Deceased told Thompson several times, to let him loose. Thompson would not do it. Deceased then struck Thompson in the face. Witness then left her room, and left prisoner standing in the door by Thompson. Witness saw no more, except that she saw deceased start out of the door, and Thompson and prisoner followed him. Thompson when he first came in, had his knife open and kept it in his hand, all the time. Prisoner and Thompson both seemed to be after deceased as he went out of the door. After this, prisoner and Thompson came back in the house, and Thompson said he had cut deceased and had cut him deep. Thompson staid at the house till morning.

Cross-Examined—When deceased and Thompson were about to fight, prisoner said, boys don't fight in the house, and caught the arm of Thompson. Jane Wardsworth shut the door as the three went out. Thompson always came in the house with his knife open.—'twas his habit.

Dr. John H. Carriger, stated: That on the night deceased was cut, he was called to see him. Deceased was very faint from loss of blood, and the wounds on his person. He breathed with difficulty. Witness found him with a wound on the left side entering about the cartilages of the ribs penetrating the stomach, one entering the chest cavity a little below in front of left shoulder blade, and other less important wounds, over various parts of his body. The two wounds first mentioned were in opinion of witness, mortal. Deceased asked witness to come to see him; that he was dying and wanted to bid him farewell; that he knew witness would do all he could for him, and asked forgiveness for his former bad treatment of witness. Told deceased that though badly wounded, witness hoped he would recover. Deceased replied, that he knew he was dying. Deceased said the wounds

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were inflicted for a little cause. Deceased lived from Friday till Sunday.

William McMichael, said, the deceased came to his house on Friday night about eleven or twelve o'clock, and said that he was cut and bound to die. Deceased was very bloody, faint, and asked to lie down. He staggered when witness took hold of him, and laid him down in the front room. Witness asked him how he let a man cut him up so; deceased said there were two of them. Witness asked him who cut him, and he said James Thompson, and that prisoner held him while Thompson cut him; that prisoner pulled him out of the house, and kicked him as he went out.

John Duncan said, that he saw deceased on the night he was cut, at the house of Griffin on front street. He asked for Jack Gammell. Deceased was bloody. Witness went to him and asked what he wanted. He replied, he wanted witness to go with him after a doctor. Witness started with him. Deceased got short of breath; witness caught him and suggested his going to his brother's-in-law, and took him there. His brother-in-law went for the doctor, and witness stayed till the doctor came. Asked deceased where and how he got cut. He said he was bound to die. Thompson cut him at Jane Wardsworth's; that Thompson and prisoner came there together, and that he was lying on a bed with a woman; that when Thompson said he could whip any God damned son of a bitch in the house, he rose up and Thompson clinched him, and prisoner took hold of him and made out that he was trying to part them, but would not do it till he deceased was cut all to pieces.

Catharine Calhoun, testified: That about half-past eleven or twelve o'clock on Friday night, she saw the deceased; he was covered with blood; when he saw witness, he handed out his hand and said farewell sister, farewell, I am a dying man. Witness asked him how he came in that fix he replied, sister, I was in a bad house. Witness asked him why he did not run, and he replied, how could I run, while

the prisoner held me by the arm Thompson cut me. Deceased exhibited no ill-will to Thompson or prisoner, that witness could see. Deceased said, sister get down and pray for me; my trust is in the Lord, but you pray for me. He was good and pious.

Counsel for the prisoner objected to the admission of so much of the testimony of John H. Carriger, Wm. McMichael, John Duncan, and Catharine Calhoun, as related to the declarations of the deceased.

The Court overruled the objection and allowed all the evidence to go to the jury, and to this the prisoner excepted.

It was admitted by the prisoner's counsel in the argument, that Thompson killed the deceased, and that prisoner went with Thompson on the night in question, to Jane Wardsworth's, and was present when Calhoun was killed. The Court thereupon charged the jury, that if they should believe that the prisoner went with Thompson to the house of Jane Wardsworth with no common intent between them to have a difficulty with Calhoun, and when they got there a fight took place between Thompson and Calhoun in the house, and prisoner participated or took part in it, and after they got out into the yard, Thompson stabbed Calhoun and prisoner held him, so that Thompson might cut him, and Calhoun died of the wounds then inflicted on him, then prisoner is guilty of the crime of murder, as much so as if the fatal wound had been inflicted with his own hand. But if the jury should believe from the evidence, that prisoner did not take part in the fight, that he did not hold Calhoun so that Thompson might cut him, but that he only interfered to separate the parties, then he was guilty of no crime, and the jury should acquit him.

To this charge the prisoner excepted.

The jury found the prisoner guilty of murder. Prisoner's counsel moved the Court to commute the punishment from

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death to perpetual imprisonment, on the ground that the evidence on which he was convicted was circumstantial. The Judge said that if he believed he had the power, he would commute the punishment, but that in his opinion the evidence was not circumstantial, and he had no power over the matter; and to this decision prisoner excepted.

At the same term the prisoner moved for and obtained a rule *nisi* for a new trial on the following grounds:

1st. Because the Court erred in overruling the showing of the prisoner for a continuance.

2d. Because the Court erred in refusing to allow the prisoner to ask Stephen D. Lewis, who had qualified himself as a juror in answer to the questions propounded to him under the statute, and was put by the State on the prisoner: "Whether or not he Lewis had not said to the counsel for the prisoner on the morning of the trial in the Court room that the prisoner was guilty and ought to be hung."

3d. Because the Court erred in admitting in evidence the declarations of the deceased as set out in the brief of the testimony.

4th. Because the jury found contrary to law.

5th. Because the jury found contrary to the weight of the evidence.

6th. Because the jury found contrary to the evidence.

7th. Because the Court erred in refusing, on motion of prisoner's counsel, to commute the punishment to perpetual imprisonment, stating that he would commute the punishment, but in his opinion the evidence was not circumstantial, and it not being so, he had no power so to do.

The Court, after argument, overruled the motion for a new trial, and prisoner excepted.

C. J. WILLIAMS and J. J. SLADE, for the plaintiff in error.

Solicitor General, OLIVER, for the State.

By the Court.—BENNING, J. delivering the opinion.

The Court below refused to grant the motion for a new trial. Was that right?

One of the grounds of the motion was, that the verdict was contrary to the evidence. Was this ground well founded?

There can be no doubt, that Guilford interfered in the fight between Thompson and Calhoun, by laying hold of Calhoun. He may have done this to aid Thompson, or he may have done it, to separate the combatants. If the former was his object, he was guilty; if the latter was his object, he was innocent.

Which was his object? Or, rather, is it clear beyond a reasonable doubt, that the former, and not the latter, was his object? This is the question, so far as the present ground is concerned.

The answer to the question, depends, mainly, on the dying declarations of Calhoun himself.

Duncan's testimony as to these declarations is, that Calhoun declared, that "when Thompson said he could whip any God damn son of a bitch in the house, he rose up, and Thompson clinched him, and prisoner took hold of him, and made out like he was trying to part them, but would not do it, till he deceased was cut all to pieces."

According to this, Guilford "made out like he was trying to part them," all the time, and finally did part them, though not until after the mortal wounds had been given.

That Guilford was merely feigning an effort to part the combatants, could have been only matter of *opinion*, with Calhoun. Is there not enough to raise a reasonable doubt, as to whether, he was not mistaken in this opinion?

The time of the fight was eleven or twelve o'clock of a dark rainy night. Calhoun therefore, in getting his impressions, would be deprived of the aid of a sense the most important of all, the sense of sight. Guilford was drunk;

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and a drunken man can make but an awkward hand at parting two men fighting. It may well be, that the honest efforts of such a man to accomplish that object, would operate unfairly; and if they do, it is most natural that the party against whom they so operate, will construe them into foul play. Guilford did, finally, part the combatants; true, not until after Calhoun was "cut all to pieces." But there is no evidence to show, that Guilford, if trying to part them in good faith, could, by his utmost efforts, have done it sooner than he did. He was drunk—he was a man "not strong" in his arms—the night was dark and rainy—the stabbing was probably completed in a few seconds, after the parties commenced fighting. And if Guilford was merely feigning, why should he part them, as long as Thompson was disposed to fight. In the dark he could not know the extent of the wounds inflicted by Thompson, if he could know, that wounds were inflicted at all. And if his object was to aid Thompson, why should he separate them until he knew this? Why rather, should he not continue the aid, until Thompson expressed himself satisfied, or desisted from the fight? And then, what motive was there, for Guilford's joining Thompson in the fight. He had no cause of quarrel with Calhoun. No word of insult, or of anger, had passed between them. It was Thompson, that was attached to the woman, Playmile, not he. The connection between him and Thompson, seems to have been transient. They came to the house together, but came there in ignorance of whom they were to meet. Guilford departed almost directly after the fight, in company with Morman, a friend of Calhoun, leaving Thompson behind, where he stayed all night. When the parties were about to fight in the house, Guilford said, "boys, dont fight in the house, and caught the arm of *Thompson.*"

We think that there is enough to raise a reasonable doubt, as to whether Guilford was not really, rather than feignedly, merely, endeavoring to separate the combatants.

If there is, the verdict was contrary to the evidence.

This ground of the motion, then, is in our opinion, a good ground.

There is nothing in the second ground. *King vs. The State 21, Ga. 221.*

Nor is there anything, in the first and third grounds. See *Thompson vs. The State*, argued and decided immediately before this case.

The fourth and fifth grounds are involved in the sixth, which has already been considered. ■

The case is manifestly, not one of circumstantial evidence. Therefore, the seventh ground is without foundation.

A new trial is granted on the sixth ground alone, viz: that the verdict was contrary to the evidence.

Judgment reversed.

DANIEL G. HUGHES, propounder, plaintiff in error, vs. WYATT MEREDITH and WIFE, caveators, defendants in error.

If the person who writes the will, takes a large benefit under it, then, in order to show that the testator knew the contents of the will, it is necessary to show, that the will was read over to him, or by him, or to show that he gave instructions for such a will, or to show something equivalent as evidence to one of these facts.

Caveat to will, from Twiggs. Tried before Judge POWERS, September Term, 1857.

This was a caveat, tried on appeal from the Ordinary, to a paper propounded as the last will and testament of John W. Allen, deceased. •

The Ordinary pronounced in favor of the paper propounded as the last will and testament of John W. Allen, deceased,

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and gave judgment admitting the same to probate and record, except the *tenth* and *fourteenth* clauses, which he rejected, as coming within the provisions of the Act of 1818, concerning the manumission of slaves by will. From this judgment of the Ordinary caveators appealed, and the case was tried by a special jury, at September Term, 1857, of Twiggs Superior Court.

Both parties having submitted their proofs, after argument by counsel, propounders requested the Court to charge the jury as follows:

1st. That if from the testimony they should believe that deceased had sound and disposing mind and memory, so as to dispose of his property with judgment and discrimination, although they should believe him to be in a dying state when he made his will, the law considers him in such cases as having testamentary capacity.

2d. That by the principles of the common law of force in Georgia, *it is only in a case where the capacity or mind of a testator is imbecile or doubtful*, and the person writing the will takes a considerable legacy under the will, that the law requires proof of the reading of the will by the testator, or a knowledge of its contents.

3d. But when the testator is of sound and disposing mind and memory, and can read and write, and does actually sign the will, and say it is his will, and that he had read it or heard it read, (there being no proof of fraud on the testator,) such a will being in accordance with the principles of the law, must be set up and sustained by a jury, notwithstanding any opinion they may entertain as to the justice of its provisions.

4th. That however capricious or unreasonable a will may be, whether by it the property of testator was given to his kin, or to strangers to his blood, or to a person who has no claim by kindness or friendship on his bounty, it was the legal right of testator to dispose of his property by will, in such way as might have seemed good in his own eyes.

5th. That the will must be sustained by the jury, unless it satisfactorily appears that deceased, from lack of sufficient mind and memory at the time of making it, or other cause, was constrained to act against his will, intentions, affections, and wishes.

6th. That to constitute undue influence, some act or acts must be proved to have been done by Combs or Hughes, to cause Allen, the deceased, to dispose of his property by will, contrary to his wishes and desires.

7th. That if the jury believe that testator read the will, or heard it read, it is evidence that he knew its contents.

His honor Judge Powers refused to charge the second, third and fifth requests, in the words thereof, not because he says the principles therein stated were not abstractedly true, but as applied to this case, he desired to qualify them.

The jury having been charged by the Court, found for the will, with the exception of the 10th and 14th clauses thereof, attempting the manumission of slaves contrary to the laws of the State of Georgia.

Caveators moved for a new trial, because

1st. The jury found contrary to the evidence, and against the evidence.

2d. Because the verdict was contrary to law.

3d. Because the jury found against the charge of the Court.

4th. Because the verdict is decidedly and strongly against the weight of the evidence.

5th. Because the Court erred in allowing the propounder to read the will to the jury, as it contained clauses manumitting slaves.

6th. Because the Court erred in refusing to charge the jury, that the testator having endeavored to manumit and set free a part of his slaves by his said will, avoided the whole will, but charged that it only avoided the clauses in and by which said manumission was attempted.

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Upon argument, the Court set aside the verdict, and granted a new trial on the first, second, and fourth grounds taken in the rule.

Whereupon, propounders except, and assign for error,

1st. The refusal of the Court to charge in the language of the 2d, 3d and 5th requests made by counsel for propounders, without qualification, addition or alteration.

2d. The granting a new trial in the cause, upon the grounds or any of them upon which said judgment was predicated.

S. T. BAILEY; IVERSON L. HARRIS, for plaintiff in error.

C. B. COLE; JAS. J. SCARBOROUGH, *contra*.

By the Court.—BENNING, J. delivering the opinion.

Was the Court right in refusing to give the second, third, and fifth requests, in charge?

As to the refusal to give the second, in charge.

The law requires, that in *every* case, the testator must know the contents of the will; but in ordinary cases, the law will take his bare signature, as proof, that he does know them.

This is not an ordinary case. In this case, the person who wrote the will and his kin, took a large part of the property willed away.

Now in such a case, what amount, or kind, of proof, does the law require, to show that the testator knew the contents of the will? Does it require proof, that the will was read over to him, or read by him, or, proof that he gave instructions for a will, corresponding with the will? And will it be satisfied by proof of no facts but these two, reading or instructions?

It is admitted on all hands, that proof of one or both of these two facts, is the most satisfactory of any; still we are not prepared to say, that there may not be other facts, the

proof of which will be sufficient; but this, we think, we may say, that for any facts to be such others, they must be as potent as one of these two.

In such a case as the present, in which the person who writes the will, takes a large interest under it, and he a stranger to the blood of the testator, the *presumption* of law, is, that the testator, although signing the will, *does not know* its contents. The *onus*, then, is upon him who propounds the will, to rebut and overcome this presumption, by showing, that the testator *does know* the contents of the will. Now, is *knowledge* of the contents of the will, susceptible of being shown, by proof short of that above indicated? It seems difficult to conceive, that it is. See *Bell vs. Man*, 5 Ga. 469; *Paske vs. Ollatt*, 1 Eccl. R. 273.

There is nothing contrary to this view even in the *dicta* in *Barry vs. Butlin*, 6 Eccl. Rep'ts, 417, and, in the decision, there is, perhaps, something in accordance with the view. In that case, there were interlineations in the handwriting of the testator, and other facts, showing, all together, that he must have read the will over.

We do not know of any authority, for the distinction taken in the request, that "*it is only in a case where the capacity or mind of the testator is doubtful*, and the person writing the will takes a considerable legacy under the will, that the law requires proof of the reading of the will by the testator or a knowledge of its contents." Suspicion is aroused, even, when the testator's capacity is undoubted. The Roman law entertained this suspicion to such a degree, that it declared that the person who writes the will, shall take no benefit under it. *Paske vs. Ollatt*, 1 Eccl. R. 273.

We think, that we may say, that if the case be one in which, the person who writes the will takes a large benefit under it, then, in order to show, that the testator knew the contents of the will, it is necessary to prove that the will was read to him, or read by him, or that he gave instructions for such a will,

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or to prove some other fact or facts, equal as evidence to one of these.

In the present case, the person who wrote the will and his near relations took, as we have seen, a large share of the property disposed of by the will.

We, consequently, see nothing wrong in the refusal of the Court, to charge this second request.

As to the the third request.

Were the facts, that this testator signed the will, and said that it was his will, and that he had read it or heard it read, such as to require a jury to sustain the will, even though the person who wrote the will, took a large benefit under it? This is the question involved in this request.

And this question, according to the view already taken of the second request, may be resolved into this, were these facts as strong, as would have been the fact that the testator read or heard read, the will; or the fact that he gave instructions for such a will, had these latter facts existed.

The circumstances of the case considered, we think they were not as strong. These circumstances, go far, very far, to show, that the testator neither read the will, nor heard it read. If he neither read it nor heard it read, his saying that it was his will, could amount only to this, that he had unbounded confidence in the person who drafted it, was willing blindly to accept any will which he might write. The fact of the signature then, is, of all those mentioned in the request, the only one that can be much depended on, as a real fact. And that, by itself, as we have seen, will not do. Certainly the others of those facts add very little to that one, not enough to make the whole lot equal to a reading of the will by or to the testator, or to instructions for the will, given by him.

We think, then, that the Court was justified, in refusing this request.

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If we are right thus far, it must be obvious, that the Court was right in refusing the fifth request.

We think the judgment ought to be affirmed.

Judgment affirmed.

ELIJAH COOK, plaintiff in error, vs. **THACKER V. WALKER**, et al., defendants in error.

A complainant may move to dismiss his bill, with costs, as a matter of course, at any time before a decree; and file a new bill for the same object at any subsequent time.

In Equity, from Harris Superior Court. Decision by Judge Worrill, at October Term, 1857.

Thacker V. Walker and others filed their bill of complaint against Elijah Cook. At March Term, 1854, of Harris Superior Court, the case was heard on demurrer, and the demurrer overruled; to which decision counsel for Cook excepted, and the Supreme Court reversed the judgment of the Court below.

At September, 1854, the judgment of the Supreme Court was entered on the minutes of the Superior Court as the judgment of that Court. Complainants then moved to amend their bill, which the Court refused, and ordered the bill to be dismissed. To this decision counsel for complainants excepted, and at February Term, 1855, the Supreme Court reversed the judgment of the Superior Court; which judgment of the Supreme Court was likewise entered upon the minutes of the Superior Court as the judgment thereof.

At September Term, 1855, of the Superior Court, complainant presented his amendment, which was allowed by the Chancellor. To this decision counsel for Cook excepted,

and the Supreme Court reversed the judgment allowing the amendment, on the ground that complainants "being neither children nor descendants of children of the marriage, are not within the scope of the marriage consideration, and that not claiming as heirs at law of the deceased party, nor being entitled so to claim, they are, as far as any benefit was intended for them in the marriage settlement, volunteers, and the said agreement cannot be reformed at their instance."

At October Term, 1857, of the Superior Court, complainants moved to dismiss their bill *without prejudice*, which motion defendants resisted. The Court granted the motion, dismissing the bill without prejudice, and counsel for Cook accepted.

JONES & JONES ; and RAMSAY, for plaintiff in error.

WM. DOUGHERTY, for defendants in error.

Judge BENNING, having been of counsel in this case, did not preside.

By the Court.—McDONALD J. delivering the opinion.

The only question in this case is upon the judgment of the Court below granting the motion to complainants to dismiss their bill without prejudice.

Under former decisions of this Court in this cause, which have each been made the judgments of the Court below, the bill was still in Court, and the complainant had the unquestionable right to move to dismiss it. The judgment of the Court below on the demurrer to this bill, ordering it to be sustained, was reversed by this Court, that the complainant might be allowed to amend his bill. The judgment of reversal annulled the judgment on the demurrer and retained the bill in Court. The subsequent refusal of the amendment did not, of itself, reinstate judgment on the demurrer and carry the bill out of Court. There must have been an order or de-

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crec of the Court. It does not appear that there was either. A plaintiff may move to dismiss his own bill, with costs, as a matter of course, at any time before a decree. 2 *Daniel's Ch. Pr.* 929. Before the orders of 1845, which are not of force here, a complainant was not prevented from filing a new bill for the same object at any subsequent time. *Ib.* 930, *side paging.*

Judgment affirmed.

ROBERT FINDLAY, plaintiff in error, vs. WILLIAM B. PARKER,
defendant in error.

After the evidence was closed, the Court told the jury, that a certain part of it was insufficient to support the plea. That part was sufficient to support the plea; but its effect was annulled by another part. No motion was made for a new trial.

Held, That for such an error, a new trial ought not to be granted by this Court.

Complaint, from Bibb Superior Court. Tried before Judge POWERS, at May Term, 1857.

William B. Parker brought suit against Robert Findlay as endorser on two promissory notes made by V. D. Tharp and George Wilcox, payable to the order of Findlay, and by him endorsed to plaintiff.

The defence was, that Findlay being *endorser*, notified Parker to sue on the notes, which he failed to do for more than three months after receiving said notice, whereby defendant was discharged.

Plaintiff's attorney read the declaration and notes, and closed.

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Defendant proved that he sent to, and had served upon plaintiff, on the day of the date thereof, the following written notice, viz :

“MACON, April 4, 1856.

Col. W. B. Parker.

Dear Sir:—In consequence of the absence of my foreman, I will not be down town this evening, but would say, loose no time in suing George Wilcox, as there is but little time before return day, and oblige,

Yours respectfully,

ROBERT FINDLAY.”

He further proved that Parker, at the time said notice was served, had the notes sued on, and no others upon which defendant was bound.

Plaintiff in reply proved that Wilcox died on or about the 4th June, 1856, and within three months from the 4th April, 1856.

Counsel for plaintiff demurred to the sufficiency of the notice given by defendant to plaintiff. The Court sustained the demurrer, and instructed the jury to find for the plaintiff. To which ruling and charge defendant excepted.

The jury found for the plaintiff \$1,666 55, besides interest and cost.

Whereupon, defendant tenders his bill of exceptions, &c.

STUBBS & HILL, for plaintiff in error.

LANIER & ANDERSON, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

The bill of exceptions says this: “The plaintiff’s counsel then demurred to the sufficiency of the notice.” “After argument the Court sustained the demurrer, and ruled that the

notice to sue was insufficient and directed the jury to find for the plaintiff”

This, we suppose, means, that the Court, at the request of the plaintiff’s counsel, told the *jury*, that the notice was insufficient; for the notice, as well as all the other evidence, was before the jury. The evidence had been closed.

We think, that the notice was sufficient. “Loose no time,” is a command.

But still, we think, that a new trial ought not to be granted. The other evidence was sufficient to annul the effect of this—that is the effect of the notice. The other evidence showed, that the principal died within the term allowed to the holder to sue such principal in. 3 *Kelly*, 527.

There was no motion for a new trial, so the case does not fall within the new trial Act of 1854.

Judgment affirmed.

THOMAS CRUTCHFIELD, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

A judgment, though it may be erroneous, is not *void*, if the Court had jurisdiction of the case and the parties. Therefore, it will, whilst it stands unvacated, be a bar to another proceeding for the same matter.

Scire facias to forfeit recognizance, from Crawford. Decision by Judge POWERS, September Term, 1857.

Thomas Crutchfield, the plaintiff in error, became surety for Jonathan J. Jones, in a recognizance, the condition of which was as follows:

“The condition of the above obligation is such, that if the

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said Jonathan J. Jones shall be and appear at the next Superior Court to be held in and for the said county, on the first Monday in September next, then and there to answer touching a shooting and intent to kill, charged to have been committed by the said Jonathan J. Jones, upon one Joseph R. Ansley, and shall not hence depart without leave of Court; then this obligation to be void, else to remain in full force."

The recognizance was dated 27th May, 1856.

Ansley, in the mean time, having died of the wound, the Solicitor General, at September Term, 1856, handed out an indictment against Jones for *murder*, and the grand jury returned a true bill. At the same Term of the Court, the case was called for trial, and Jones failing to appear, judgment *nisi* to forfeit the recognizance was entered, and *scire facias* issued calling on Jones and Crutchfield to show cause at the next Term why judgment absolute should not be signed. Crutchfield, who alone was served, appeared at March Term, 1857, and showed for cause, why said judgment should not be rendered, that no indictment had been found against Jones, his principal, for the offence recited in his recognizance, and to which alone he was bound to appear and answer. The Court held the showing good and sufficient, set aside the judgment *nisi*, and declared the same to be void.

At the same Term of the Court, (March, 1857,) another judgment *nisi* was taken by the Solicitor General and *scire facias* thereupon issued, and again served on Crutchfield, to show cause at September Term, 1857, why judgment final should not be entered. Crutchfield appeared and pleaded in bar to any further action or judgment, the judgment already rendered, and which remained of record unrevoked. The State demurred to this plea. The Court sustained the demurrer, adjudged the plea insufficient, and awarded judgment against defendant for the amount of the penalty of the recognizance, which was \$1,000. To which decision defendant by his counsel excepted.

• CULVERHOUSE; and HALL, for plaintiff in error.

MONTFORT, Sol. Gen., *contra*.

• *By the Court.*—BENNING, J. delivering the opinion.

The condition of the bond was, that Jones should appear “to answer touching a shooting and intent to kill, charged to have been committed by the said Jonathan J. Jones, upon one Joseph R. Ansley,” and should “not hence depart without leave of Court.”

The substance of the judgment rendered in the first *sci. fa.*, was, that this condition only bound Jones to appear, to answer to an indictment for an assault with intent to murder Ansley, and did not bind him to appear, to answer an indictment for the murder of Ansley, even, although, Ansley might have died of the wounds received by him, in the assault.

In *Adams vs. The State*, which was such a case as the present, this Court held the principal bound to appear, to answer an indictment for murder. 21 *Ga. R.* The judgment, then, we think, was erroneous. But still, it was the judgment of a Court having jurisdiction, and therefore, was a judgment good until *set aside*. *Rogers vs. Evans*, 8 *Ga.* 143.

The judgment is, no doubt, subject to be set aside on motion; but as it stands, it is good; and being good, it is a bar to another *scire facias* on the bond, for that must, of necessity, be the same as the first.

In holding to the contrary, the Court below, as we think, erred.

Judgment reversed.

Bowen and Bowen vs. Slaughter and Brown.

JOHN BOWEN and NANCY BOWEN, plaintiffs in error, vs. JOHN SLAUGHTER and AMOS BROWN, defendants in error.

A grant was issued to Alfred Brown. There was no such person. Held, that this made a case of *latent* ambiguity, and that *aliunde* evidence was admissible to show who was the person meant.

In Equity, from Marion County. Decision by Judge WORRILL, September Term, 1857.

Alfred Bowen, in the year 1825, being a resident of Stokes district in the county of Morgan, and entitled, under the Acts of 1825 and 1826, for the distribution of the land acquired of the Creek Nation of Indians, to two chances or draws in the land lottery of 1827, gave in his name to the receivers of names in Stokes district. Through some mistake in entering or transcribing the name of Alfred Bowen into the book sent to the Executive Department, instead of the name of *Alfred Bowen*, the name of *Alfred Brown* was returned. The name of Alfred Brown, so returned, drew a lot of land, No. 82, in the 31st district of, originally Lee, but now Marion county, and a grant to this lot was issued to the name of Alfred Brown. Alfred Bowen never knew that any mistake had been made in the return of his name, and up to the time of his death supposed that his name had drawn nothing in the lottery. Amos Brown, who at that time resided in Stokes district, and had sent in his name and drawn a lot of land at the same lottery, took out a grant to the lot of land in question, in the name of Alfred Bowen, and some time after sold the same lot to John Slaughter, who entered upon the same and claimed it as his own property.

Under these circumstances, John Bowen, the son, and Nancy Bowen, the widow of the said Alfred Bowen, filed their bill in equity against John Slaughter and Amos Brown, stating the facts above set out and charging that Amos Brown took out the grant to the lot in question, well know-

ing that it properly belonged to Alfred Bowen and not to himself, and that John Slaughter had purchased the same from Amos Brown with full knowledge of the fact that Amos Brown was not rightly entitled thereto, and that Amos Brown persuaded him to make the purchase by an assurance that he (Amos Brown,) would hold him harmless in case of any litigation as to the lot of land, instituted by the said John Bowen and Nancy Bowen. By their bill they prayed that it might be decreed by the Court that the lot of land so drawn in the name of Alfred Brown, was the right and property of the plaintiffs as heirs at law of the said Brown, and that the defendants should deliver the same up to them, and might account to the plaintiffs for the rents and profits in respect of the lot of land, during the time they had occupied the same.

Attached as exhibit to this bill, was a list of the names of the persons in Stokes district entitled to draw in the lottery, and from which it appeared that no person of the name of Alfred Brown, lived at that time in that district.

To this bill a demurrer was filed by the defendants on the following grounds:

1st. There is no equity in complainant's bill of complaint.

2d. Because complainants showed, by their own bill that they have no title to the lot of land mentioned in the said bill.

3d. Because complainants cannot, in this indirect way, perfect an inchoate title, even if it be true that a mistake occurred as charged in the bill.

4th. Because complainants, by their own showing, have a good and perfect remedy at common law if they have any right at all.

5th. Complainants by their own showing, exhibit the fact that this defendant has a good statutory title, by the possession of the said lot of land more than seven years continuously, immediately preceding the commencement of said cause in equity, and that under color of title.

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The Court sustained the demurrer and dismissed the bill, and to this decision of the Court below the present bill of exceptions was filed.

FISH & ROBINSON, represented by B. HILL, for plaintiffs in error.

BLANDFORD & CRAWFORD, *contra*.

By the Court.—BENNING, J. delivering the opinion.

Was the Court right in sustaining the demurrer and dismissing the bill?

The case presented by the bill, is one of *latent* ambiguity. The grant, upon its face, shows nothing ambiguous. It is to Alfred Brown, and there is nothing on its face to show, that no such person as Alfred Brown ever existed. When, however, enquiry outside of the grant, comes to be made for this Alfred Brown, no such person is to be found. This outside enquiry shows the grant, which had appeared unambiguous, to be ambiguous. The case becomes one of *latent* ambiguity.

And *abunde* evidence is admissable for the purpose of clearing up a latent ambiguity. One of Bacon's maxims is: *Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum, verificatione facti tollitur*. 1, Green. Ev. 297; *Doe d. Henderson vs. Hackney*, (Atlanta, Aug. 1857.)

And this, if not more than this, is "*declared*" to be the law by an Act of the last Legislature.

The complainants then, may, at law, show, if they can, by parol evidence, what they allege to be true in their bill. And if they can do this at law, they have no right to come into equity.

We think that the Court was right in dismissing the bill.

Judgment affirmed.

JOHN W. BRANTLEY, plaintiff in error, vs. D. DEMPSEY, defendant in error.

It is too late to object that a set-off cannot be pleaded in a suit for unliquidated damages, after there has been a trial and verdict on such plea. It ought to have been made at the trial.

Illegality, from Bibb county. Decision by Judge LAMAR, at January adjourned Term, 1858.

This case was submitted in the Court below, upon the following agreed statement of facts :

John W. Brantley commenced suit against Dermod Dempsey, alleging that he had covenanted to put and keep in repair a certain storehouse which he had rented to plaintiff for the year 1855, and upon the faith of said covenant Brantley had rented the storehouse at a certain specified price, and put his goods into it: And further alleging that Dempsey had failed to make the repairs agreed on, by reason whereof the rain had damaged Brantley's goods to the amount of \$500. Dempsey plead the general issue, and a set-off, consisting of a judgment for some \$250, obtained on a portion of the rent notes, and a *fi. fa.* issued thereon, and that Brantley was insolvent. The case was tried on the appeal at May Term, 1857, in Bibb Superior Court, when the following verdict was returned: "We the jury find for the plaintiff one hundred and twenty-five dollars damages to be paid by this amount being credited on the *fi. fa.* in favor of Dempsey vs. Brantley;" and which credit was made on Dempsey's *fi. fa.* by the Clerk at the instance of Dempsey's counsel, 4th September, 1857. Upon this verdict, Brantley's counsel entered a general judgment against Dempsey for \$125, and notified his counsel, (who informed Dempsey of the fact at said May Term, 1857,) that they should claim a lien on said judgment for their fees in said case.

Subsequently, to-wit: 7th July, 1857, a *fi. fa.* issued in favor of Brantley against Dempsey, on said judgment, at the

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instance of Brantley's counsel, and levied upon Dempsey's property 24th October, 1857, to which he filed his affidavit of illegality, on the following grounds:

1st. Because the *fi. fa.* issued without being predicated on any verdict or confession of judgment authorizing it.

2d. Because the same has been fully paid off and discharged.

3d. Because the verdict on which the same is founded authorized the amount found by the jury to be credited on Dempsey's *fi. fa.*, which had been done, and Brantley's *fi. fa.* thereby paid.

4th. Because to the suit brought by plaintiff vs. defendant, on which this *fi. fa.* is predicated, Dempsey pleaded a set-off, which was allowed by the jury, and this *fi. fa.* has illegally issued and is null and void.

The Court sustained the illegality, and counsel for Brantley excepted.

SAM. HUNTER; and LANIER & ANDERSON, for plaintiff in error.

L. N. WITTLE, *contra.*

By the Court.—McDONALD, J. delivering the opinion

This was clearly a suit for unliquidated damages, to which a set-off could not be pleaded, according to law. But the defendant did plead as a set-off, a judgment which he had obtained against plaintiff for rent. It appears from the record that the parties went to trial on the petition and plea without objection. If there had been objection made and overruled, and the plaintiff in error had wanted any benefit from that, he ought to have brought it up. The finding of the jury was in conformity with the issue to be tried by them, and was in effect assessing damages for plaintiff, but finding a balance for the defendant on his plea of set-off. The verdict ought to have been for a specified sum for the defendant,

after deducting the amount of damages found for the plaintiff, and perhaps it would have been better to have had the verdict amended in that way; but as the result is precisely the same as between these parties, as the matter now stands, it is quite useless to disturb it.

There can be but little doubt that if the plaintiff had moved to strike out the plea of set off, the Court ought to have had it stricken.

The cases referred to by plaintiff's counsel are not like this, as far as we have been able to examine them. The case in *Cro. Car.* was not the allowance of a set-off, but a mere finding that the defendant should be allowed to pay the verdict in dying, if it was lawful for him to do so. In the case in *Cowen*, the plaintiff objected to the plea, and the case went up on that. There was no objection to the plea here.

Judgment affirmed.

RICHARD ROE, casual ejector, and **JAMES FITZGERALD** tenant in possession, plaintiffs in error, vs. **JOHN DOE**, *ex dem.* **HENRY WILLIAMS** and **DRED W. PACE**, defendants in possession.

[1.] A bond for titles must be proved, before it can be used in ejectment as evidence to show color of title.

[2.] In ejectment, the plaintiff proved the contents of a lost deed by a witness. At the time he had in his pocket an established copy of the deed, but this was not known to the defendant. The defendant moved for a new trial. *Held*, That this was not a sufficient ground for a new trial.

[3.] In ejectment the proof was, that the tenant was living on the lot of land sued for, and had fifteen or twenty acres of it enclosed. The Court told the jury, that under this proof they might find a verdict against the tenant for the whole lot.

Held, That this charge was no ground for a new trial.

Ejectment, from Stewart county. Tried before Judge Knapp, October Term, 1857.

A motion was made for a new trial by the plaintiff in error, who was defendant in the Court below, on the following grounds:

1st. That the Court erred in ruling out the bond from Dred W. Pace to Owen Henry Cravy, which had been transferred as appears on the back of said bond to John Fitzgerald, on the ground that the execution of said bond and said transfer was not proved by either of the subscribing witnesses.

2d. That the plaintiffs proved a copy of the deed from Booth to Pace by Interrogatories, when said plaintiff had in Court an established copy of said lost deed at the time of the trial, which was unknown to defendant.

3d. That the Court erred in charging the jury that if it was proved that the defendant was in possession of any part of the land it was sufficient proof of possession to authorize a recovery of the whole lot, the case being made out in other respects.

4th That the finding of the jury was contrary to evidence.

5th. That the finding of the jury was contrary to law.

In support of the motion the defendant made an affidavit to the effect that he did not know at the time of the trial that the plaintiffs had the established copy of the deed in their possession.

John R. Spoon, one of the witnesses, testified: That about the time of the commencement of the suit, in the year 1854, the defendant was living on the lot of land in dispute; that in the year 1844 or 1845, the defendant cleared a small part of the lot adjoining the lot he lived on, by extending his cowpen over the line so as to take in a small part of this lot, the part so cleared was less than one acre. That in 1846, Owen Cravy, deadened a piece of ground on the lot in question, fifteen or twenty acres, but did not move on the land. In

1847, Owen Cravy moved from the neighborhood, and John Fitzgerald did not claim the land until after Cravy left, nor did he object to Cravy's working the same; that Fitzgerald subsequently built and moved on the said lot, and remained there till he went to Alabama.

The Court refused the motion for a new trial, and ordered that the verdict should stand and plaintiff have judgment thereon.

To this decision of the Court the defendant excepted.

TUCKER & BEALL, for plaintiff in error.

WORRILL, and B. HILL, for defendants in error.

By the Court.—BENNING, J. delivering the opinion.

Was the judgment overruling the motion for a new trial right? This is the only question.

Certainly the tenant was not entitled to use the bond, and its transfers, as color of title, without proof of their execution. There can surely be no doubt of this. When a bond, or the transfer of one, is the foundation of a *suit*, the bond or transfer need not be proved, until denied on oath. In other cases, it must be proved in the first instance.

[1.] There is nothing, then, in the first ground of the motion for a new trial.

The second ground was, "that the plaintiff proved a copy of the deed, from Booth to Pace, by interrogatories, when said plaintiff had, in Court, an established copy of said lost deed, at the time of the trial, which was unknown to the defendant."

Are there any degrees in secondary evidence? I think not. *Doe d. Gilbert vs. Ross*, 7 *Mees and W.* 104.

But it is not even suggested here, that there was any difference between the two copies.

[2.] Obviously, there can be nothing in this ground.

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The defendant was living on the lot, and had fifteen or twenty acres of it enclosed.

It was open to the jury to infer from this, that the defendant claimed the whole lot. And if a person is in possession of a part of a lot by enclosures, &c., and claims the whole of it, he cannot complain, should the verdict, in an ejectment for the lot, be against him for the whole: If, in such case, he is in possession of the whole, the verdict is right; if he is not, the verdict deprives him of nothing—injures him in no way.

[3.] We think, then, that there was nothing in the third ground.

We do not see in what respect the verdict was contrary to the evidence, or contrary to law. Hence, we cannot admit the validity of the remaining two grounds, the fourth and fifth.

We affirm the judgment of the Court below.

Judgment affirmed.

FARISH CARTER et al. plaintiffs in error, vs. MARTHA NEAL,
adm'or., &c., defendant in error.

[1.] It is not a fraud in stockholders of a company not responsible for the company's debts, to ask the passage of an act to enable the company to issue bonds, holding the private property of stockholders liable; and a stockholder may advance money on such bonds and the transaction will be good, if free from fraud. .

[2.] The misconduct of trustees, for the sale of property, cannot affect the rights of a creditor interested in the sale.

[3.] An allegation in a bill, that trustees for the sale of property, will pursue their duty to a certain extent, but afterwards the bill alleges, upon conjecture, and assigns no fact or circumstance to warrant it, that they will do an act grossly wrong, such fanciful allegation is insufficient to raise an equity.

[4.] The indebtedness of a party making *bona fide* a deed of trust, and who

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makes no provision for the payment of prior debts, is not fraud.

[5.] The doctrine of two funds applies only to cases where contending creditors have a common debtor.

[6.] To entitle one creditor to be subrogated to the rights of another creditor, the former must have satisfied the latter his demand so as to relieve him from trouble, expense and risk.

[7.] A complainant cannot have a decree that money raised from the property of a defendant shall be handed to her to pass over to a creditor at whose instance the money was raised, and assume his place in regard to enforcing a demand, already satisfied, against private property of stockholders.

Equity, from Muscogee county. Decided by Judge Wor-
RELL, January, 1858.

The bill of exceptions in this case was filed to the decision of the Court below, in refusing to dissolve an injunction which had been granted under the following circumstances:

Martha Neal, as administratrix of Joseph Neal, filed her bill for an injunction to restrain Farish Carter, Raphael J. Moses, and Randolph L. Mott, from selling property comprised in a deed under which they were trustees. She stated in her bill that Joseph Neal, since deceased, had sold cotton to the Coweta Falls Manufacturing Company, for which the company gave him their promissory note for \$5,655 58-100; that various payments had been made on the note but that there still remained \$3,830 60-100 due thereon. That the company had procured an Act to be passed by the Legislature authorizing them to issue bonds to the amount of \$30,000, the same to be secured by a deed of trust or mortgage on the real or personal property of the company, provided the private property of the stockholders should be responsible for redemption of the bonds in proportion to the stock held by them. That in 1852, the company in pursuance of the Act, issued their bonds, of which Farish Carter became the purchaser to a large amount. That the bonds have been due and unpaid for three years. That the company, to secure the payment of the said bonds at maturity, executed their deed of trust to Raphael J. Moses, W. A.

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Redd, and H. H. Epping, by which they conveyed them all the real and personal property of the company with some nominal exceptions, in trust, under notice of default from said bondholders, to sell the same or so much thereof as might be necessary to pay said bonds. That no provision was made in the deed for the satisfaction of the then existing debts of the company. That three years before, the trustees had been notified of default under the deed, and repeatedly advertised the trust property for sale but had failed to sell the same. That two of the trustees, Redd and Epping, refused to act as trustees, and that Randolph L. Mott pretended to be substituted in their stead, and that Moses and Mott as such trustees, had advertised the property for sale in November, 1856, and would, unless enjoined by the order of the Court, apply the proceeds of the sale to the payment of the bonds. That the company was insolvent and the said deed of trust fraudulent, and void as against Joseph Neal, who was an existing creditor of the said company at the time of the execution of the said trust deed. That Farish Carter had, by virtue of the Act of the Legislature under which said bonds were issued, a double security, one against the property comprised in the deed of trust and the other against the stockholders of said company in proportion to the stock held by them, that Carter owned stock to the amount of \$10,000 and that the stockholders were responsible men. That the plaintiff could only look to the assets real and personal of said company for payment of its indebtedness to him and that by the terms of the charter the stockholders were not held individually responsible for the payment of the debts of the company, and that Carter, although he had such other security, was proceeding with the trustees, to sell the property under the provisions of the trust deed.

An injunction was granted in November, 1857, as prayed by the above bill.

The plaintiff amended her bill by stating that a part of

the property contained in the trust deed had been sold by the Sheriff of the county of Muscogee under a *fi. fa.* in favor of Farish Carter, and that John L. Mustian became purchaser at from \$8,000 to \$9,000 ; that at the sale the Sheriff declared that the same was sold subject to the incumbrance of the bonds; that the same was worth between \$19,000 and \$20,000 free from all incumbrances. She therefore prayed that the said trustees might be required first to sell the factory buildings, and lot on which they were situated, before selling any other of the property contained in the deed, and apply the proceeds in satisfaction of the bonds. That the said trustees might be required to pay her the amount of the note, which amount she would hand over to Farish Carter and that Farish Carter might be required to assign to her such an amount of said bonds as would amount to said debt, and that the stockholders might be required to pay such bonds so to be transferred to her.

Farish Carter, by his answer, denied that bonds to the amount of \$30,000 had been issued, but said that bonds to the amount of \$10,000 only had been issued, and that he had by subsequent purchase, become the holder of the whole. He also stated that if the stockholders were individually liable for the payment of the bonds, it was only after the proceeds of the property comprised in the trust deed had been exhausted.

Raphael J. Moses, one of the trustees, also filed his answer, admitting most of the facts stated in the bill of complaint and setting forth the reasons why the property had not been sold before. He also stated that Mott, the other trustee, had never acted as such, and denied all collusion or combination to wrong or injure the complainant.

Upon filing their answers the defendants moved to dissolve the injunction, on the ground that there was no equity in the bill to authorize the same, and that if there was any equity in the bill it had been sworn off by the answers.

The Court refused to dissolve the injunction, but modified

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it by ordering that the injunction should be so far dissolved as to permit the trustees to proceed to sell the property they had advertised for sale, and that the money arising from the sale, should be held by the trustees subject to the further order of the Court.

To this order of the Court the defendants excepted.

DOUGHERTY; and HOLT, for plaintiffs in error.

B. HILL; and DENTON, *contra*.

By the Court.—McDONALD J., delivering the opinion.

The grounds of complaint on which the complainant founds her equity, are

1st. That the company, the "Coweta Falls Manufacturing Company," applied to the Legislature and obtained authority to issue its bonds to the amount of \$30,000, to be secured by deed of trust or mortgage.

2d. That the company issued bonds to that amount and the defendant, Carter, became the purchaser of bonds to the amount of ten thousand dollars, which have been due and unpaid for a number of years.

3d. That the company made a deed of trust conveying all its property, with inconsiderable exceptions, to trustees named in the bill, to secure the payment of the bonds.

4th. The trustees were notified several years ago that the company had made default in payment and were required to sell. They repeatedly advertised the property for sale and as repeatedly failed to sell.

5th. Two trustees have declined to act and R. L. Mott pretends to act as a substitute, and they have advertised the real and personal property to be sold under the trust deed, on the first Tuesday in November, 1856, (1857?) and will sell, unless enjoined, and apply the proceeds of sale, first to the bonds, and then to some one else, to whom the said

company is in no wise indebted, under some private arrangement unknown to the complainant.

6th. The said company is insolvent, and the trust deed is fraudulent as to complainant's intestate, who was a creditor of the company and no provision was made for the payment of his debt.

7th. That the defendant Carter has a double security, one, the liability of the company; and the other, the liability of the stock-holders.

8th. That Carter, at the time the bonds were issued was a stock-holder in the company to the amount of ten thousand dollars—the stockholders are all responsible men, and complainant can look only to the assets of the company, the charter exempting the private property of the stockholders from liability for the debts.

9th. The sale was frequently advertised, when property would have brought a fair value, but under one pretext or another, the sale was delayed, and if now sold, it will be at a ruinous sacrifice, because of the uncertain state of monetary matters, now existing.

10th. The bill was amended and charges that the Factory building was sold in 1855, at Sheriff's sale under a fi fa in favor of the defendant Farish Carter against the company, and Carter gave notice at the sale and before any bid was made, that the factory building and the lot were to be sold subject to the bonds.

11th. Under that notice John L. Mustian became the purchaser at \$8,000 or \$9,000, Mustian knowing that he was purchasing subject to the incumbrance of the bonds.

12th. That the said property was worth between \$19,000 and \$20,000 free from incumbrances. The bill prayed, that the complainant may be subrogated to the rights of the bond creditors, that the trustees be required to hold up the surplus of the proceeds of the sale, to be applied to the payment of the indebtedness of complainant.

That the trustees be required to sell the factory buildings and the lots whereon they are situated, before selling any other property in the said deed and apply the same to the payment of the bonds.

That the trustees may be required to pay to complainant from the proceeds of the sale an amount equal to her debt, which amount she may pay to Carter, and that Carter may be required to assign, and transfer to complainant as administratrix, bonds to the same amount, and that the stockholders be decreed to pay them, and for other relief.

[1.] There is nothing fraudulent in the procurement of the act of the Legislature to authorize the company to issue bonds on the security of a deed of trust or mortgage. It was no doubt done to facilitate the obtainment of money for the use of the company. If obtained, and appropriated, *bona fide* to the use of the company, it could not affect injuriously the rights of pre-existing creditors. But if the effect had been adverse to their interest, if it was without fraud, it could be no ground of complaint. It must in such case, be attributed to the consequences of risk, or mistaken enterprise.

If the transaction was without fraud there could be no objection to a stockholder advancing money, as an individual, on securities authorized by the law of the land.

[2.] The bill shows, that the creditor several years ago notified the trustees, to whom the greater part of the property had been conveyed in trust for the payment of the bonds issued by the company, that the company had made default in payment, and that he required them to sell and that the trustees repeatedly advertised the property for sale and as frequently failed to sell.

This alleged misconduct of the trustees, if it be misconduct cannot impair the rights of the creditor to urge upon them the execution of their duty, and to receive the amount to which he is entitled, when the sale is made.

[3.] The allegation that Randolph L. Mott pretends to have been substituted in place of a trustee who has declined acting,

and that the trustees have advertised the real and personal property described in the deed of trust to be sold, and that it will be sold if the sale be not enjoined, and that the proceeds of the sale be first applied to the payment of the bonds outstanding, and the balance, after the said payment, to some one individual or individuals to whom the said company is in no wise indebted under some private agreement between the said individual or individuals and the trustees, which is unknown to the complainant, presents no equity against the bond creditor. The complainant does not allege that Mott has not been actually and legally constituted a trustee as a substitute for one of those who has declined acting. If the trustees proceed to sell and pay the creditor the amount of his bonds, it is their duty to do it, and if they abuse their trust, in the manner suggested, afterwards, they are responsible to whomsoever they may injure thereby; but the creditor is not to be delayed by such a suggestion. The allegation is supported by no fact, and as the complainant has stated it, must be conjectural altogether. A party cannot by his own fancies, create an equity for himself.

[4.] That the complainants intestate was a creditor of the company at the time of the execution of the deed of trust and that no provision was made for the payment of his debts, does not infect the transaction with fraud. It was a deed executed for a valuable and sufficient consideration, fairly paid, and expressly authorized by Act of the Legislature. This court has held that a debtor may, by a mortgage, prefer one creditor to another. The principle for which the counsel for defendant in error, seems to contend, applies entirely to voluntary conveyances, for consideration of blood, post nuptial marriage settlements, and the like. But it has never been held that a person may not, *bona fide*, create a new debt and give a lien on his property to secure its payments, without making provision for paying all he owes at the time.

[5.] The doctrine that a creditor has two funds to which he may resort, does not apply to a case like this. The funds

must be the funds of a common debtor. The Coweta Falls Manufacturing Company owes both debts. The private property of the individual stockholders is responsible for the payment of the bonds held by Carter, and they may become his debtors. It is not liable, and cannot be made subject to the payment of the debt of the complainant. The stockholders are not the common debtors of both creditors. The private property is made responsible for the bond debts to enable the company to offer a higher security to induce capitalists to take them. The stockholders are therefore securities. They are so much so, that they have an equity to compel bond-holders to exhaust the property in trust for their payment before they can resort to them. *Aldrich vs. Cooper et al.* 8 *Vesey* 388; *Kendal ex parte*, 17 *Vesey* 514; *Dorr vs. Shaw*, 4 *John. Ch. Rep.* 19; *Hayes vs. Ward*, *ib.* 132.

That the Defendant, Carter, was a stockholder in the company at the time bonds were issued does not give the complainant an equity. A stockholder who advances his money on the security afforded by the statute, is as much entitled to protection as any one else. The company is one person in law and he another. If the company prove insolvent, he must sustain a ratable loss with the other stockholders, but he is in law and equity entitled to the security as far as it goes.

The misconduct of the trustees, in not selling when they ought to have sold, and probable loss likely to accrue to creditors in consequence thereof cannot affect the rights of the bond-holders.

The notice given at the Sheriff's sale by Carter, does not affect his rights upon the bonds. He gives the legal notice to the trustees to raise his money, and he cannot be delayed, to litigate at the instance of creditors who offer him no indemnity, and who are competent to litigate for themselves. The property, it is alleged, was sold under a *fi. fa.* in favor of ~~Father~~ Carter, against the company. Carter held bonds under a deed of trust and although he might have had a resort in co-

spect to them, upon the private property of the stockholders, he had a right, to retain all the security the law would entitle him to, for the payment of his bonds; and one of the securities which he could be entitled to, was, to have the company's property sold subject to his older lien. If he continued to be a stockholder, as the bill alleges, the greater the interest it was to him, to have it so sold, to save his individual property from the ultimate ratable payment of the bonds.

The price paid for the property by John L. Mustian, the purchaser, and the value of it free from incumbrances, can have no influence on the present enquiry.

[6.] There is nothing in the bill which entitles this complainant to be subrogated to the rights of the defendant Carter. Carter has not received his money. The complainant has neither paid nor offered to pay his debt in order to claim to be subrogated to his rights. But if she had, she could not in that way be subrogated to his rights so as to convert her debt against the company, into a demand having the security of the private property of the stockholders for its payment.— But if the defendant, Carter, has a remedy against the property sold under his *fi. fa.* by reason of the circumstances under which the sale was made, which she has not the power to use to subject that property to the payment of her debt, she might perhaps by discharging his debt entitle herself to be substituted in his stead, and proceed in that way to send the bonds against that property, but she has certainly no equity to restrain, and for her convenience, subject him to delay and expense which she may be unwilling to encounter. We do not say that she may not use the same remedy to subject that property to the payment of her debt, if she fails otherwise to get it. We pass no judgment on that.

[7] The complainant has no right to ask a decree that money raised from the sale of the company's property, should be paid to her, to hand to Carter and claim therefor an assignment of bonds of equal amount that she may be enabled to turn around and collect them from the private property of the

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stockholders. Neither the object, nor the process proposed to be used in its accomplishment, will be countenanced by a Court of Equity. It will be the transfer of a claim satisfied in law.

It is the duty of the trustees to return any surplus of money in their hands remaining from the sale, after paying the bonds, for the payment of the company's debts, and the allegation in the bill founded on conjecture only, is not sufficient to warrant the Court in granting an injunction restraining them from doing an act forbidden by their duty.

It is unnecessary to refer to the answers further than to say that their denials of many of the allegations in the bill, overturn much of what the complainant conceived to give her an equity against the defendants.

Judgment reversed.

**THE SOUTH-WESTERN RAILROAD COMPANY, plaintiff in error,
VS. ELIZABETH PAULK, administratrix, defendant in error.**

- [1.] Corporations are embraced in a statute, under the designation of *persons*, unless expressly excepted, or excluded by necessary implication on the ground of the total inapplicability, of the statute, as to the subject matter, to them.
- [2.] Neither a corporation nor an individual, have a vested right to do wrong; none such can be conferred.
- [3.] In a suit for damages, for the killing of a person by a railroad, under the Act of 1850, the action should be brought in the county where the principal office of the corporation is kept.
- [4.] The fourth section of the Act of 1856, being *in futuro* only, does not repeal by implication, the Act of 1850; or in other words, take away a cause of action which originated in 1855, prior to its passage.
- [5.] If through the default of the corporation or its servants, the passenger is placed in such a perilous condition as to render it an act of reasonable prudence

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caution, for the purpose of self-preservation, to leap from the cars, the company is responsible for the injury he receives thereby; although if he had remained in the cars, he would not have been injured.

[6.] The question of damages considered.

[7.] It is a general and well settled doctrine, recognized both in England and America, that no suit can be maintained or brought by any executor or administrator, in his official capacity, in the Courts of any other country, except that from which he derives his authority.

To authorize a foreign administratrix to sue in this State, under the Act of 1850, (*Cobb* 341,) the intestate must have departed this life out of this State.

New trial from Taylor county. Tried before Judge WORRILL, October Term, 1857.

This was an action brought in Taylor Superior Court by Elizabeth Paulk, as administratrix of Uriah Paulk, deceased, against the South-Western Railroad Company, to recover damages for killing the said Uriah by the cars on the said railroad, at Butler, in Taylor county, on the 29th day of December, 1855. The letters of administration were granted to plaintiff by the Orphan's Court of Macon county, in the State of Alabama.

The defendant filed a plea to the jurisdiction of the Court on the ground that the suit should have been brought in the county of Bibb, where defendant kept its principal office, and not in the county of Taylor. This plea was overruled by the Court, and the defendant excepted.

The jury having been empanelled, the defendant demurred to the declaration, on the ground that Uriah Paulk, the plaintiff's intestate, died within the limits of the State of Georgia, and county of Taylor, and not in a foreign State, and consequently, under the Act of 1850, the action could not be sustained by a foreign administrator. This demurrer the Court overruled and defendant excepted.

The defendant then moved the Court to dismiss the action on the ground that it was brought by Elizabeth Paulk, administratrix of Uriah Paulk, deceased, instead of by the widow of said Uriah Paulk, it having been admitted that said Uriah

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Paulk died leaving a widow surviving him; which motion the Court overruled, and defendant excepted.

Brief of evidence.

The plaintiff then offered in evidence an exemplification of her appointment as administratrix of Uriah Paulk, deceased, not including the letters of administration. To the admission of this, the defendant objected. The Court overruling the objection, admitted the same as evidence, and the defendant excepted.

Charles Phelps, testified: That he was the conductor of the train running from Macon to Columbus, at the time of the collision on the 29th of December, 1855, when Uriah Paulk was killed. The collision was caused by both trains being out of time.

Riley Peacock, testified: That he was with the deceased in the train when the collision occurred. Understood from the agent at Reynold's depot that the train he was on was running out of time. The conductor was looking out ahead all the time, and on seeing the other train coming, hallowed to the passengers to jump off, and jumped off the train just before the collision occurred. Uriah Paulk sat nearest the door at the back end of the car and rose and went out, and either jumped or fell off the car just before the collision occurred, and the train ran back over him. There was a general rush to the door at the back end of the car, but deceased was the only man that succeeded in getting out, as the door shut to and was so crowded by the passengers that it could not be opened.

B. F. Newsome, testified: That he was called professionally after the accident to see Paulk. Witness described the injuries received by Paulk, and stated that he died from them.

Patrick Calhoun, testified: That he was acquainted with Uriah Paulk in his lifetime; was traveling in the same train with him at the time of the accident. Paulk was a man

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that drank some, but had not taken more than two or three drinks on the day of the trip referred to; and was perfectly at himself on that day.

Thomas Livingston, testified: That Uriah Paulk married his daughter. Paulk was a man of good character and worth about \$25,000 at the time of his death, and left a wife and six children. He was a man of good capacity to acquire property.

Thomas Gates, testified: That he was a passenger on the train with deceased, at the time of the accident. Some one exclaimed, "jump out." When the exclamation was made no one countermanded the order. Witness did not recognize the voice of the person giving the order, as that of the conductor. After the collision, witness found the conductor and engineer off the train, and the engineer told him that he jumped off just before the collision, and left his engine reversed.

Winston, and Abbott, testified: That they were officers of the Mutual Life Insurance Company of New York, being the President and Secretary of the company—produced a pamphlet containing tables showing the terms on which risks are taken by the company. If a man is forty-two years old and in good health, so that the company would insure his life, the payment of \$441 54, would secure his family \$1,000; or the payment of an annual premium of \$34 05, would secure the same sum. Knew of no money value for the deprivation of a husband and father.

W. C. Bandy, testified: That some person directed the passengers to leap from the cars; was of opinion that it was not the conductor. Is confident that Paulk would have jumped off even if no one had told him to do so, as he had previously stated his intention to do so, if there was any danger.

James Tune, stated: That Uriah Paulk was a very immoral man and intemperate. Was a good farmer and with a good capacity to manage his farm.

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Allen G. Bass, testified: That the character of Uriah Paulk for morality and sobriety was not good. Does not consider he was worth more than \$400 per year to his family. His character as a farmer was good.

Ralph O. Howard, testified: That Uriah Paulk's character for morality was not good; he was a man who used liquor very extravagantly. His services were worth \$250 per year to his family.

R. M. Pitts, testified: That Uriah Paulk was a man of bad morals, and was a constant drinker, and gambler. Supposes he was worth to his family as much as an overseer. He was a good farmer and manager on his plantation.

Asa Marshall, testified: That he was well acquainted with Uriah Paulk and had known him from a child. He was a thrifty man and his morals and character were good. At the time of his death his services were worth to his family \$1,500 to \$2,000.

Daniel Royal, testified: That he knew Uriah Paulk. He was an industrious money making man. His services in the superintending and management of his affairs was worth from \$1,500 to \$2,000.

The Court then, (among other things) charged the jury, "that the plaintiff as foreign administratrix had a right to sue in this action upon the cause set forth in the declaration."

To this charge the defendant excepted.

The Court further charged, "That in case of collisions of trains, a passenger seeing such collision about to take place was not in fault in jumping off the train, especially if the jury should believe that an order to do so was given by the conductor or other employee of the company on the train."

To which charge the defendant excepted.

The jury found for the plaintiff \$12,000, and costs.

Defendant moved for a new trial on the following grounds :

1st. That the Court erred in overruling defendant's plea to the jurisdiction.

2d. That the Court erred in overruling the motion of defendant to dismiss said action on the ground, that Uriah Paulk, plaintiff's intestate, died within the limits of the State of Georgia, and in the county of Taylor, as appears upon the face of the declaration.

3d. That the Court erred in ruling that the action was properly brought by the administratrix of Uriah Paulk, instead of by the widow of said Paulk.

4th. That the Court erred in admitting the exemplification of the appointment of Elizabeth Paulk as administratrix, there being no letters of administration produced.

5th. That the Court erred in ruling that the plaintiff had a right as foreign administratrix to sue in this action upon the cause set forth in the declaration.

6th. That the damages assessed by the jury were excessive.

7th. That the verdict was contrary to law.

8th. That the verdict was contrary to evidence.

9th. That the Court erred in charging the jury that "in case of collision of trains, a passenger seeing such collision about to take place, was not in fault for jumping off the train, especially if the jury should believe that an order to do so was given by the conductor or other employee of the company on the train."

The motion for a new trial was refused, and defendant excepted.

POE & GRIER ; and **GORDON**, for plaintiff in error.

STUBBS & HILL ; and **C. J. WILLIAMS**, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

This is an action for damages, against the South Western R. R. Company, for having destroyed the life of defendant in error's intestate, while a passenger on plaintiff in error's train, in the county of Taylor, in December, 1855.

[1.] The right of action is claimed by virtue of the Act of 1850. It is not pretended that it existed at common law. That Act provides that, "In all cases thereafter, where death shall ensue from or under circumstances which would have entitled the deceased, if death had not ensued, to an action against the perpetrator of the injury, the legal representative of such deceased shall be entitled to have and maintain an action at law against the person committing the act from which the death has resulted; one-half of the money to be paid to the wife and children, or to the husband of the deceased, if any, in case of his or her estate being insolvent." (*Cobb*, 476.)

Counsel for the Company insists, 1st. That this act does not embrace Railroads; and 2dly. That if it does, it impairs the obligation of the contract between the corporation and the people of the State, which was entered into five years before the act of 1850 was passed; and was therefore void.

Railroad Companies are not expressly included or excluded by the words of the act. The terms used are, "perpetrators of the injury," and "persons committing the act." Now the well settled rule of construction is, that corporations are embraced in the words of a statute under the designation of persons, unless expressly excepted or excluded by necessary implication, on the ground of the total inapplicability of the statute, as to the subject matter, to them. (8 *Peters' Rep.* 426; 11 *Wheaton*, 412; 16 *Curtis*, 643; 6 *Peters'*, 29; 12 *Peters'*, 134; *Dwarris*, 478, 476, 655.) Tested by these rules, it is clear that the act of 1850 extends to and embraces R. R. Corporations. The word *person*, both in civil and penal statutes, applies to *artificial* as well as *natural*

persons. And Railroads, to say the least of them, are quite as capable and likely to kill, or to use the language of the statute, "to perpetrate the injury," or "commit the act" here complained of, as individuals.

[2.] As to the constitutional competency of the legislature to pass the act, there cannot be a shadow of doubt: neither a corporation nor a citizen can have a vested right to do wrong; to take human life intentionally or negligently. To prevent so serious an evil, the General Assembly may compel the wrong-doer, whether private or corporate, to make pecuniary compensation. The act is general; applicable alike to all, and making no odious discriminations against railroads. The legislature might make a reckless destruction of life like this a capital felony on the part of the employees of the road, *if it be not one already*. And for myself I believe it would, as a preventive, be better to do this than to treat human life as stock, to be paid for in money.

When subscriptions were made to the stock of this road it must be presumed to have been done with a full knowledge that the legislature had this power.

[3.] It is contended that the Court erred in sustaining the jurisdiction of Taylor county over this cause. For the defendant in error it is argued, that at common law corporations had residence wherever they held real estate; and that consequently a suit anywhere, at or between the termini of the road, is subject to no constitutional objection. And that in cases like this, it is no hardship. That while a corporation has an extended area for action and the transaction of business, the area for redress should be equally extensive.

This doctrine, in England, is true, for certain purposes and to a limited extent. For the purposes of taxation, building bridges, &c., corporations who own real estate in any county, will be included under the words, "inhabitant of the county," &c. And be liable there to all the litigations incident to such statutes. (*Central R. R. Co. vs. Davis*, 17 Ga. Rep. 328, and cases there cited.) Still, notwithstanding corpora-

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tions, such as this, did not exist in this State when the Constitution was adopted, locating the trial of causes in the county of the defendant's residence, we are of the opinion that except in those cases where recent acts have enlarged the jurisdiction, that suits should be brought in the county where the principal office of the corporation is kept; and in the present case, in Bibb county—the city of Macon in that county being the place where its principal office is kept. Nor do we consider this case saved by the act of 1856. (*Pamphlet*, 155.) This Act gives the right to sue in any county in which the cause of action originated, *only* to him whose person or property has been injured. Neither the person or property of Elizabeth Paulk, administratrix, &c., has been injured by the running of the cars of the S. W. R. R. Company. The first section of this act, as to jurisdiction, is retrospective, as well as prospective; but the 4th section is future only, as to the cause of action. We do not intend to say, that had this cause of action come under the act of 1856, as it clearly does not, instead of the act of 1850, the question as to jurisdiction might not be decided differently. Some reasons exist why this class of cases should be tried in the county where the killing took place, as well as injuries of an inferior grade. The reasons however are not so strong in the former as in the latter. In any event the right is permissive only, and not restricted. And perhaps it would be safer, all things considered, to renew this suit at least in the county proper of the residence of the corporation.

[4.] Both sides agree that this action is brought under the Act of 1850. It is insisted on the part of the plaintiff in error that that Act is repealed by the Act of 1856; which although it does not repeal the Act of 1850, *eo nomine*, does repeal all laws in conflict with it; and that the right in this case, not having been consummated by judgment, is gone.

Is the Act of 1850 in conflict with the Act of 1856? We think not, and for the reason already intimated, in considering the question of jurisdiction. The 4th section of the Act

of 1856 applies only to causes of action originating after its passage. Its terms are, "if any one *shall be* killed," &c., (*Pamphlet*, p. 155.) It does not retroact so as to take away rights which had accrued in December, 1855, prior to its passage. The Act of 1850 is of force until the Act of 1856 goes into operation. Until then, there is no conflict between them, and therefore no repeal by implication.

[5.] Did the Court err in charging the jury that it was the right of a passenger to jump, in case of the collision of trains, especially as both the engineer and conductor did so; and the order to jump was given by the conductor, or one of the agents of the Company, occupying the conductor's place, after he had left the train.

That death ensued in this case from the gross misconduct of the conductor is indisputable. Candor constrained the counsel for the road to make this concession; it is unnecessary therefore to enter into a minute investigation of the question of diligence, &c. Against the doctrine contained in the charge, however, the case of *Collins against the Albany and Schenectady R. R. Company*, (12 *Barbour's Rep.* 492,) has been cited. Upon examination it will be found that it does not sustain the contrary proposition. The injury in the New York case was occasioned by the defendant's leaving his seat and going upon the platform, "as if to go out," when the collision was about to take place. "The jury fixing their attention," as the Court said, "upon what seemed to them the more immediate cause of the disaster, found as a fact in the case, that the plaintiff was entirely free from negligence." And then Judge Harris adds, "And perhaps, after all, the jury were right in their conclusion, that the mere fact of leaving his seat and going to the platform, under the circumstances, did not amount to negligence on the part of the plaintiff." *A multo fortiori*, did it not in this case.

But the opposite principle from that contended for by the able counsel for the plaintiff in error is abundantly fortified by authority. (13 *Peters' Rep.* 181; 13 *Curtis*, 115;

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Pierce on American R. R. Law, 475; and 23 *Penn. State Rep.* 147.)

In the case of *Stokes vs. Saltenstall*, cited from 13 *Peters*', the Circuit Court charged, and the Supreme Court affirmed, the instructions as law, that "if the want of proper care or skill of the driver of a stage coach, placed the passengers in a state of peril, and they had at that time a reasonable ground for supposing that the stage would upset, or that the driver was incapable of managing his horses, the plaintiff is entitled to recover, although the jury may believe, from the position in which the stage was placed by the negligence of the driver, the attempt of the plaintiff, or his wife, to escape, may have increased the peril, or even caused the stage to upset; and although they may also find, that the plaintiff and his wife would probably have sustained little or no injury, if they had remained in the stage."

Mr. Pierce states the rule thus: "If through the default of the Company, or of its servants, the passenger is placed in such a perilous condition as to render it an act of reasonable precaution, for the purpose of self-preservation, to leap from the cars, the Company is responsible for the injury he receives thereby, although if he had remained in the cars he would not have been injured." And the author cites, in addition to the cases already quoted, 9 *Metcalf*, 1; 15 *Illinois*, 468, 471; 17 *Ib.* 509; 1 *Sandford*, 89.

[6.] Another main question in this case is, were the damages excessive?

It is admitted that in actions of this sort, the jury cannot find vindictive, punitive, or exemplary damages; and that they are confined to injuries of which a pecuniary estimate can be made; and that they cannot take into consideration the mental sufferings occasioned to survivors, by the death. Such has been the uniform construction put by the British Courts upon the 9 and 10 *Victoria Ch.* 93, which is almost identical with the act of 1850. (12 *Eng. L. and E. Rep.* 497; 2 *Eng. C. L. Rep.* 578.)

Conceding, then, that the verdict is to be confined to pecuniary damages, and that nothing is to be given by way of *solatium*, still there is great difficulty in establishing a proper basis for assessing damages. It would seem that when the proof shows the yearly income or worth of the deceased, and you fix the average duration or expectation of human life, you have two data by which to solve, with some approximation to accuracy, this vexed problem. The proof of the value of the service of the deceased, varies in this case, from \$250 to \$2,000 per annum. By *Dr. Wigglesworth's Tables*, with *Mr. Ingersoll Bowditch's corrections*, published in the 11th volume of the *American Jurist*, pages 492-3-4, the average duration of the life of a man aged 45, is 23.92 years. By the *Northampton Tables*, it is 20.52, and by the *Carlisle*, 24.46. In this State, we are inclined to think that 20 years would be a fair average number, as many tables in the United States go as low as 18 years. These tables embody the law of average. Upon them the rates of life insurance are framed. Upon them an insurance company will insure the life of a "*substantious*" man, as he is called in the Scotch law, 45 years old, to the amount of \$1,000, upon the payment of \$469 03 cash.

In ascertaining what shall be this cash payment, another consideration in addition to the law of average is to be observed, to-wit: The value in interest of the use and interest of the \$469 03, which, as it increases, balances any exceptional breaches of the law of average. For example: invested at 10 per cent., and experience shows that cash invested in life insurance companies readily realizes that amount—the sum of \$469 03, compounded every year, will amount to upwards of \$1,000, the sum insured, in seven years. Therefore, at the end of seven years, the company will not suffer by the death of the individual; and will reap clear profit every day after that time. Their risk, therefore, is not on the average duration alone of human life, but conjointly with the increasing value of a specific sum of money.

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If the law of average says a man will live twenty years, they are willing to risk his life seven out of the twenty. For to secure \$1,000, they require the cash payment of a sum which, compounded, shall yield \$1,000 in seven, and not in 20 years. If, then, \$469 03 would secure \$1,000, fifteen times \$469 03, or \$7,038 35, would secure \$15,000, which, at 7 per cent., would yield an annual income of \$1,050, about the average value of the annual services of the deceased, according to the testimony. It may be argued, therefore, that \$7,038 35, and not \$12,000, as found by the jury, was the actual marketable value of the life destroyed in this case.

We are not satisfied, however, with this rule of computation. For it is based upon the idea of a large profit resulting to the insurance company; their calculations, while professedly founded upon the idea of 20 years duration of life, is, in point of fact, staked upon the risk of 7 years only. Besides, the party is killed, and an estimate, applicable only to the living—whose lives may actually be insured—cannot fairly and legitimately be predicated of the dead; still, we do not absolutely reject it.

Taking 20 years, again, as the average of human life, what is the present value of an annuity of \$1,000 upon such a life? \$10,594. (See *Encyclopædia Brit. Title, Annuity.*) If the annual value of his life was \$500, then the present worth would be half that sum. If \$750, then three-fourths the amount

I have made no allusion in this latter calculation, to the yearly expenses of the party, which is ordinarily to be deducted from the annual income.

It may be objected to this rule, that whatever may be adopted as the *present* value of one's services, it offers no security for the future. They may, hereafter, yea, the very next year, be worth a great deal more or a great deal less. He may become a cripple; helpless, and earning nothing thereafter, the remainder of his life. That by change of circum-

stances, his means of success may be doubled, and the fruits of his labor immensely increased. He may, on the other hand, be now sober. and soon become an inebriate; or a drunkard, and immediately reform. Shall the present, then, determine arbitrarily the future?

The best reply to all this, is, the uncertainty of all sublunary things. One kills your slave; you recover of him a thousand dollars. Had he been let alone, he might have died of disease in less than a month's time after his life was taken. You buy or sell a slave at \$1,000: he is sound, but is killed by the falling of a tree, or of apoplexy, the next day. The loss has to be submitted to. This objection is rather specious than substantial.

In any view of the question of damages, something is due, independent of income, for the loss of the care, protection and assistance of the husband and father. Indeed, there are so many elements entering into the account, that in whatever light we look at the subject, we become perplexed in the attempt to pursue it. There must be some latitude left to the soundness of the discretion of the jury, over the subject, as a question of fact. And the greatest, if not the only protection against the abuse of this discretion, must be found in the stern determination of the Courts, not to allow a verdict to stand, which bears the impress upon its face, of passion, partiality, or prejudice.

Look at the persons who compose the passengers upon a railroad train, and who are smashed up by one of these disasters. See the variety of ages, sexes, conditions, avocations of the crowd; doctors of divinity and of medicine, judges and lawyers, planters, merchants, mechanics, manufacturers, bankers, teachers, men, women and children: to apply a uniform rule, by which to compensate for the life of each, would require more than the wisdom of Solomon in all his glory. But we dismiss the subject, at least for the present.

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[7.] There remains but one more point to be considered, and that is, whether this action can be maintained by the plaintiff, under the letters granted to her in Alabama. That depends upon the Act of 1850. The preamble recites, that "whereas, it frequently happens that persons depart this life in another State, owning judgments, bonds, mortgages, and other specialties, and promissory notes, and bills of exchange, and other evidences of debt, and divers causes of action against citizens of this State," &c.

"SEC. 1. For remedy whereof, be it enacted, That from and after the passage of this Act, it shall and may be lawful for any administrator or administrators, and administratrix, for any executor or executors, and executrix, or guardian, of any deceased person or persons who may have departed this life *in another State*, and a citizen or citizens of such other State, at the time of their decease, owning at said time any judgments," &c. *Cobb*, 341.

Passing by the criticism that Mr. Paulk had no cause of action in this State, nor any other, for the loss of his own life, at the time of his decease, it is clear, that to entitle a foreign administratrix to sue in her representative character, in this State, her intestate must have departed this life in Alabama, or another State than Georgia, and been a citizen thereof at the time of his death. In this case, the declaration shows upon its face, that the intestate died in Taylor county, in this State, when the proof shows, that he was a citizen of Alabama at the time he was killed.

It is insisted that the rule which excludes foreign trustees, is a mere technical regulation, and should be disregarded, especially as between the several States of the American Union.

It is a general doctrine of the common law, recognized both in England and America, that no suit can be maintained or brought by any executor or administrator, in his official capacity, in the Courts of any other country except that from which he derives his authority. The authorities upon this point are exceedingly numerous and conclusive. 3 *P. Wms.*,

369 ; 2 *Ves.* 35 ; 1 *Rice*, 179 ; *Ambler*, 416 ; 2 *Mad. Rep.* 101 ; 1 *Cranch*, 259 ; 9 *Wheaton*, 505 ; 15 *Peters*, 1 ; 1 *New Hamp.* 291 ; 4 *Rand.* 158 ; 2 *Gill and Johns.* 493 ; 5 *Greenleaf*, 261 ; 11 *Mass.* 256, 313 ; 20 *Martin*, 232 ; 3 *Day*, 74, 303 ; 4 *Mason*, 16, 32 ; 20 *Johns.* 229, 266, *et passim.* See this point strongly stated by this Court, 5 *Ga. Rep.* 295, 296.

We fully appreciate the ingenuity of the argument submitted by Mr. Hill, upon this point. And it may be, that this case falls within the mischief intended to be provided for by the Act of 1850. Still, it is unquestionably excluded by the obvious words of the Act. Unless, then, we are prepared to legislate on this case, and to extend the Act, not only to a case not covered by it, but excluded, by all fair interpretation, this action must fail. To prevent a failure of the law, we might usurp the power proposed ; but confining the Act to its terms, it embraces a large class of cases ; and therefore, we can give it full operation without stretching its language. We are unwilling to do this.

The Legislature may have had a motive for restricting the Act to cases where the testator or intestate died abroad. Many Northern persons and others, coming to this State to transact business temporarily and return, die here. Many of them leave debts, more or less. In this very case the deceased was probably indebted for board, physician's bill, &c. It may have been in the mind of the Assembly, that in such cases, administration should be taken out here, and not drive domestic creditors to go abroad to collect their claims. Be this as it may, the words of the Act are so plain, that it would require no small degree of judicial boldness to disregard them.

We are unanimous, then, in reversing the judgment of the Court below, upon this ground. Nor can the writ be amended by substituting the name of the widow. The right accrued under the Act of 1850, and must be enforced under that Act, or not at all.

Judgment reversed.

Downing vs. Bain and others.

LEMUEL T. DOWNING, Ex'r, plaintiff in error vs. ANN BAIN and others, defendants in error.

[1.] A legacy of \$4,000 to be paid in bonds is not a legacy that bears interest from the testator's death.

[2.] The jury is the Judge of the law, as well as of the fact.—BENNING J., DISSENTING.

Equity from Muscogee county. Decided by Judge WORRILL, May Term, 1857.

The original bill in this case was filed by Lemuel T. Downing, as Executor, under the last Will and Testament of Kenneth McKenzie, seeking the direction and construction of the Court upon the said Will.

The plaintiff (among other things) set out in his bill the 3d item of the will of Kenneth McKenzie, upon which the present question arose, and which was as follows: "Item 3d, I give and bequeath to the children begotten of the body of my beloved niece, Sophia McBride, and also the children begotten of the body of my beloved niece, Janett Bain, the amount or sum of \$4,000 each, in bonds of the Companies above specified, and I will and ordain that the amount herein bequeathed to the children of niece Janett Bain, shall be chargeable as a fund with the support and maintenance of said Janett Bain and her present husband during their natural lives; and I further will and ordain that the amount bequeathed to the children of my niece, Sophia McBride, shall be kept free from the control, management or guardianship of the present husband of the last mentioned niece, or any future husband she may have."

The plaintiff also stated in his bill that under this item, Ann Bain, Kenneth Bain, Donald Bain, and Isabella Bain, all minor children of the said niece, Janett Bain, born during the lifetime of the testator, and Kenneth McBride, Margaret

McBride, Murdock McBride, Donald McBride, and Janett McBride, living at the death of the testator, and Roderick McBride, born since, on the 4th day of April, 1855, all minor children of the said niece Sophia McBride, claimed each to be entitled to the sum of \$4,000, and also that it was claimed and insisted by the children and their parents, that not only were these children entitled, but that each and every other child that had been or should thereafter be begotten of either of the said nieces were or would be entitled to a like sum of \$4,000 each.

That by the 14th item of the said will, the testator directed that the whole residue of his estate, whether consisting of real or personal property, not disposed of in any of the former bequests, should be a fund first chargeable with the payment of all his just debts, after which the residue should be divided into three equal shares or proportions—one third of said residue to be given to the City Council of Columbus, another third to be given to the Female Asylum of the said City of Columbus, and the remaining one-third to be given to his brother, Rory McKenzie.

That these residuary legatees, and particularly the two former, insisted and claimed that under the 3d item the testator intended to bequeath the sum of \$4,000 to each only of the said two families, or sets of said children; \$4,000 to the children considered as a class only of each niece, and not \$4,000 to each child. And that they further insisted that even if the said children were entitled to take *per capita* then only the nine children born and living at the death of the testator were entitled each to its \$1,000, and that neither Roderick McBride, born since, nor any other child born since or hereafter to be begotten of the said two nieces are, or will be entitled to any share under the will.

The Court was requested by the Counsel on the part of the Ladies' Education and Benevolent Society, and the Mayor and Council of the City of Columbus uniting, to charge the Jury "That if the Jury believe from the words of the will it was

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the intention of the testator to confine the bequest of \$4,000 in the 3d item of the will to each set of children, instead of each child, then they will so find in their verdict." This charge the Court refused to give, and the counsel excepted.

The same counsel then asked the Court also to charge, "That if the Jury believe it was the intention of the testator to confine his bequest to the children of his nieces then born, that they will then exclude, by their verdict, the after born child." This charge the Court also refused to give, and the counsel excepted.

The Court then, among other charges, charged the Jury as follows: "That it was the province of the Court to give a legal construction to the words of the will of the testator, and that the Jury were bound to take the construction put upon the words of the will by the Court, and that according to the construction put upon the words of the will by the Court the testator intended by the words in the third item of the will to give \$4,000 to each of the children of Janett Bain and Sophia McBride, born before the death of the testator, and that if the Jury believed that Roderick McBride, a child of Sophia McBride, was born within nine months after the death of the testator, then the said Roderick was also entitled to \$4,000."

The Court also charged the Jury, "That the said children of Janett Bain and Sophia McBride, legatees under the will, were entitled to interest on the amount of their legacies from the time of the death of the testator."

To both of these charges the counsel for the Ladies' Education and Benevolent Society, and for the Mayor and Council of the City of Columbus, then and there excepted.

The jury found by their verdict that each of the children of Janett Bain and Sophia McBride were entitled to \$4,000, besides interest from the death of the testator, and that Roderick McBride, born since the death of the testator, was also entitled to \$4,000, besides interest from the same time.

Counsel for the Ladies' Education and Benevolent Society, and for the Mayor and Council of the City of Columbus,

thereupon filed their bill of exceptions, assigning as error the charges so given by the Court to the jury, and the refusal of the Court to charge as requested.

JONES & JONES, for plaintiff in error.

BUCHANAN ; TIDWELL ; THOMAS and DENTON, *contra*.

By the Court.—BENNING J., delivering the opinion.

The Court told the jury that “the testator intended, by the words in the third item of the will, to give \$4,000 to each of the children of Janett Bain and Sophia McBride.” Is this what the testator intended? or did he intend to give \$4,000 to the children of Janett Bain, collectively, and \$4,000 to the children of Sophia McBride, collectively?

The question is a difficult one. “\$4,000, each” *child*, is a somewhat more easy and natural reading, than “\$4,000, each” *set of children*. This favors the interpretation adopted by the Court below. “The amount” (viz. \$4,000) “herein bequeathed to the children of my niece,” is a somewhat more easy and natural reading, than, “The amount,” (viz., the *several sums* of \$4,000 each) “herein bequeathed to the children of my niece.” This favors the interpretation rejected by the Court below. There is, I think, very near a balance.

And where this is so, the decision ought, I think, to be for the side most favored by the law. And the law in distributing a man’s property, puts his kin above strangers, however helpless and needy, and worthy the latter may be. It makes no provision for strangers. And with the law, in this respect, agrees nature.

We think that what the Court told the jury, as above stated, was right.

This also disposes of the first *request*.

The second request was abandoned.

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The Court also told the jury, that the legacies of \$4,000, bore interest from the testator's death.

In this we think the Court was wrong. The legacies are *general*. They are of "\$4,000," each, true they are to be paid in certain bonds, but then they are not of certain bonds. Calling on their face for \$4,000, regardless of whether such bonds may be worth, over or under, \$4,000.

See *Smith vs. Smith*, (at Macon Term, 1857.)

There must be a new trial, then, unless the interest be remitted.

There is another question in this case on which I differ with the other members of the Court. The Court below charged the jury, that "it was the province of the Court to give a legal construction to the words of the will of the testator, and that the jury were bound to take the construction put upon the words of the will by the Court." I do not think that the jury were so bound. I think that the jury are the judges of the law, as well as of the fact, in all cases. I will briefly state my reasons for this opinion.

The 88th section of the constitution of 1777, contains these words: "The jury shall be judges of law as well as of fact, and shall not be allowed to bring in a special verdict; but if all or any of the jury have any doubts concerning points of law, they shall apply to the bench, who shall, each of them, in rotation, give their opinion."

The 15th section had said, that the verdict of a special jury was a thing "from which there" should "be no appeal."

The 18th section is in these words: "The special jury shall be sworn to bring in a verdict according to law, and the opinion they entertain of the evidence; provided it be not repugnant to justice, equity, and conscience, and the rules and regulations contained in this Constitution of which they shall judge." *Watk. Dig.* 24.

As soon then as the constitution of 1777 was adopted, the jury became the judges of the law, as well as of the fact, if

they were not so, before; and the special jury, the judges even of the *Constitution*. This must be indisputable.

Was there ever any charge made in this Constitution, in this respect?

The 2d section of the third article of the Constitution of 1789, is in these words: "The General Assembly shall point out the mode of correcting errors and appeals, which shall extend so far as to empower the judges to direct a new trial by jury within the county where the action originated, which shall be final."

Here is a repeal of so much of the Constitution of 1777, as made the verdict of a special jury, a thing from which there could be no appeal; here is a grant to the Court of the power to give one new trial; here the Court is clothed with a qualified veto on the power of the jury, over the law and the fact. But it is only a qualified one, the power to judge of the law, as well as of the fact, is not taken from the jury.

The 3d section of the 4th article, is in these words; "Freedom of the press and trial by jury shall remain inviolate."

"*Trial by jury*" must mean such trial by jury as was then in existence. Subject to the change wrought in it, by the said 2d section of the 3d article, and the trial by jury, then in existence, was that established by the aforesaid sections of the Constitution of 1777. No mere act of the legislature could have changed it; but none was passed attempting to change it.

On the adoption, then, of the Constitution of 1789, the jury still remained the judges of the law, as well as of the fact. This, I think, nobody can doubt.

Was there, afterwards, any further change made in the aforesaid parts of the Constitution of 1777?

In the 1st section of the 3d article of the Constitution of 1789, it is declared, that the Superior Courts shall have power, "to order new trials on proper and legal grounds." Here is given to the Court a general veto on the exercise of the power over law and fact, granted to the jury, which is quite

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an enlargement of the Court's former power. But there is nothing here, depriving the jury of their power to judge of the law, as well as of the fact.

The 5th section of the 4th article is in these words : "Freedom of the press and trial by jury, as heretofore used in this State shall remain inviolate."

What sort of jury trial was that, which was used before the time of the Constitution of 1798? That which was established by the Constitution of 1777, modified by the Constitution of 1789. There could have been no other. The legislature had no power to establish any other; they had not attempted to establish any other. But that was a sort in which, the jury were the judges of the law, as well as of the fact. This, then, was the sort that, by the Constitution of 1789, was to remain "inviolable."

On the adoption of the Constitution of 1789, then, the jury still remained the judges of the law as well as of the fact. This I think will not be denied.

Has there been any change, in this respect, since? None. The provisions aforesaid of the Constitution of 1798, remain untouched. No statute has been passed attempting to touch them. The legislature has not had the power to pass any mere statute touching them. It has not had any power to prevent jury trial, as used before the Constitution of 1789, from remaining "inviolable;" and, therefore, it has not had the power to take away from the jury the right of judging the law, as well as the fact. The *extent of the power* of the jury, must be of the very essence of jury trial, and therefore, it cannot be, that jury trial can remain "inviolable," if this power to judge of the law, is abridged.

But no attempt by the legislature, has been made to abridge it.

Courts cannot make law; therefore, they are powerless to abridge it.

I say then that the law stands, as it stood on the adoption of the Constitution of 1798; and, that by the law as it stood

at that time, the jury were the judges of the law, as well as of the fact. Then they must be so still.

This is a conclusion which, it seems to me, is absolutely *necessary*, from the premises.

But indeed the same conclusion is to be drawn from the common law. *Every* body admits, that by the common law the jury have the right to bring in a general verdict.

Of *necessity*, then, they must have the right to judge of the law, as well as of the fact.

That they have the right to judge of the law, as well as of the fact. Blackstone, Coke, Littleton, are all agreed. 3 *Black. Com.* 378 ; *Coke Litt. Sec.* 368, and *Comments*.

These are my reasons for thinking the jury the judges of the law as well as of the fact.

Judgment modified.

WINGFIELD W. LIVINGSTON, plaintiff in error, vs. JOHN LIVINGSTON, defendant in error.

- [1.] A *certiorari* may lie under the Constitution and the old law, although, not provided for, by any Act of the Legislature.
- [2.] *Certiorari* lies for error committed in a *habeas corpus* case before the Justices of the Inferior Court.
- [3.] In *habeas corpus* cases before the Justices of the Inferior Court, the Court does not expire with the delivery of the judgment, but remains in existence, and subject to *certiorari*.
- [4.] A writ of error lies for either party, in a *habeas corpus* case growing out of an imprisonment for contempt, under the Act of 1821, for the restoration of the possession of personal property.

Certiorari, in Chattahoochee Superior Court. Decision by Judge KIDDOO, November 24th, 1857.

This case came on upon exceptions to a decision of Judge

Kiddoo, overruling a motion to dismiss a writ of *certiorari* which had been issued under the following circumstances:

John Livingston, the defendant in error, on the 1st of January, 1857, sued out a possessory warrant before Mark A. George, one of the Justices of the Inferior Court, against Wingfield W. Livingston, the plaintiff in error, for the recovery of two negro slaves; and upon the hearing of the case, it was ordered that W. W. Livingston should deliver the two negro slaves to John Livingston, or in default, should be committed to jail until he should so deliver them up. W. W. Livingston having failed to deliver up the negroes, was duly committed to jail by a mittimus under the hand and seal of Mark A. George, Esq.

On the 9th of January, 1857, Wingfield W. Livingston sued out a writ of *habeas corpus*, under the order or *fiat* of one of the Justices of the Inferior Court, and upon the writ of *habeas corpus* coming up for trial, the Inferior Court discharged Wingfield W. Livingston from jail. John Livingston, thereupon, presented a petition to David Kiddoo, the Judge of the Superior Court, setting out the facts above stated, and praying for a writ of *certiorari* directed to the Justices of the Inferior Court, and the clerk of that Court, requiring them to certify and send up the proceedings had in the *habeas corpus* cause, at the next Superior Court, and that the order of the Justices of the Inferior Court discharging Wingfield W. Livingston from jail might be annulled. A writ of *certiorari* was accordingly issued on the 28th of February, 1857.

Upon the writ of *certiorari* coming on for trial, on the 24th day of November, 1857, before David Kiddoo, the Judge of the Superior Court, the counsel for the defendants moved to dismiss the writ upon the following grounds:

1st. Because a *certiorari* is a creature of our Legislature and cannot be executed beyond the permission of the same.

2d. The writ of *habeas corpus* being a protection of liberty, its judgment is conclusive.

3d. The forum rendering the verdict is one of original jurisdiction, and its decision cannot be reversed.

4th. The plaintiff's remedy was to sue out another possessory warrant.

5th. This Court cannot pass any legal judgment in this cause which can be executed.

6th. The Inferior Court only represents the Judge of the Superior Court when sitting as a *Habeas Corpus* Court.

7th. The commitment was for a contempt, and therefore, a criminal proceeding, and the State cannot bring up such a cause.

8th. That the judgment of the *habeas corpus* tribunal is an executed judgment.

The Court, however, overruled the motion to dismiss on all the grounds taken. To this decision the defendant excepted, and assigned as error all the above grounds.

W. S. JOHNSON; and MCCOY & HAWKINS, for plaintiff in error.

THOMAS, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Was the judgment overruling the motion to dismiss the *certiorari*, right?

The first ground of the motion was, "Because a *certiorari* is a creature of our Legislature, and cannot be carried beyond the provisions of the same."

It is understood, that the meaning of this, is, that none of the Acts of the Legislature, relating to *certiorari* extend to a *habeas corpus* case like the present; and that there cannot be a *certiorari* in any case unless there is some Act of the Legislature to authorize it in that case.

The first of these two propositions, may be admitted, but the second is denied. The Constitution, itself, gives the *certiorari*. It says, that the Superior Courts "shall have pow-

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er to correct errors in inferior judicatories, by writ of *certiorari*." Under this grant of power, the Superior Courts might have issued writs of *certiorari* before any of the Acts of the Legislature as to *certiorari* was passed; they might now issue writs of *certiorari*, if no such Acts had ever been passed.

In that case the law to be resorted to, for regulating the proceedings, would be the old law—mainly the old law relating to writs of error; for every writ of error at common law, included a *certiorari*. That writ was at once, a *certiorari* and a commission—at once an order to certify a case to a particular tribunal; and a commission to that tribunal, to hear and determine the matters of error, contained in the case. See *Davis vs. Rodgers*, decided at Atlanta, Aug., 1857. 22 G. R.

The Court to which this writ of *certiorari* was directed, was the Inferior Court, or the Justices of the Inferior Court. Such a Court, as compared with the Superior Courts is an "inferior judicatory." 1st, Its jurisdiction is as nothing, compared with that of the Superior Courts. 2d, It is the creature of the Legislature, and the power of the Legislature to create Courts, does not extend to the creation of any Courts, except Courts of a lower dignity than that of the Superior Courts. This, I think, has been the uniform interpretation of the first sentence of the third article of the Constitution.

[1.] We think, then, that the first ground of the motion, was insufficient.

[2.] The grant of power, is, "to correct errors." "Errors" is a general term, and therefore, it must embrace errors committed in a *habeas corpus* case, as well as those committed in other cases. Besides, the judgment in a *habeas corpus* case, might be *adverse* to the plaintiff. In case it were, there might be a different opinion, as to whether, "the writ of *habeas corpus* was a protection of liberty."

We think, then, that there was nothing in the second ground.

Obviously, we may say the same, of the third and fourth grounds.

The fifth ground was, "That this Court cannot pass any judgment in the case, which can be executed."

It is said that as soon as a *habeas corpus* Court of this kind renders its judgment, it expires; and, therefore, that there is, then, no Court which the *certiorari* can be directed to, or which can execute the judgment of the Superior Court rendered on the certified case.

But why should it be admitted, that this *Habeas Corpus* Court expires with its judgment? The statute is silent, as to when it is to expire. If it expires with its judgment, of what value will the judgment be? Suppose the Sheriff disregards the judgment, what tribunal is there to make him do his duty? None. See *Taylor vs. Gay*, 20 Ga. R.; *Marchman vs. Todd*, 15 Ga. R.

It is true, that *Heard vs. Heard*, 18 Ga. R., seems in conflict with these two cases; but first, that case might have been put upon another ground; there were no *merits* in it; 2dly, it did not pretend to overrule *Marchman vs. Todd*, and if it had, it would, itself, have in turn, been overruled by *Taylor vs. Gay*.

[3.] We think it not true, then, that this *habeas corpus* Court expires with its judgment. We think the Court still remains in existence to superintend the execution of that judgment, and therefore, that there is still in existence a tribunal to be reached by a *certiorari*.

Hence, the fifth ground is in our opinion insufficient.

There is nothing in the sixth ground.

[4.] Nor in the seventh. In a rule against the Sheriff, either party may except, and have a writ of error. This has, repeatedly been held by this Court. And that is as much "a criminal proceeding," as this is; so as to proceedings on forfeited bonds in criminal cases.

The truth is, that a commitment under the Act of 1821, is purely *remedial*. It is for the exclusive benefit of the plain-

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tiff in the proceeding. Cobb, 591-2. The State has no concern with it.

The eighth and last ground, was, that "the judgment of the *habeas corpus* tribunal, was an executed judgment."

True, that judgment annulled the commitment, and thus deprived the Sheriff of authority longer to hold his prisoner. But a judgment reversing that judgment, would revive the commitment, and thus restore authority to the Sheriff, to re-take, and to hold, the prisoner.

We think, then, that there is nothing in this ground.

Upon the whole therefore we affirm the judgment of the Court.

Judgment affirmed.

JOHN DOE *ex dem.* DAVID MATHIS, and JAMES M. WHARTON,
plaintiff in error, vs. RICHARD ROE casual ejector, and
WILLIAM B. COLBERT, defendants in error.

[1.] The party who took out the commission to examine a witness was in the next room to that in which the Commissioners were executing the commission, and was so known to be, by the witness. The door between the two rooms was open.

Held, That this vitiated the execution of the commission.

[2.] The answers to interrogatories were headed with a case different from that stated in the questions and commission, but there appeared enough to show that the answers, were really intended for this latter case.

Held, That they might be read in the latter case.

[3.] After the close of the argument to the jury, the Court allowed the defendant to introduce further evidence on the subject of *mesne* profits. The plaintiff expressed no surprise, asked for no continuance. The verdict was for the defendant generally.

Held, That the Court committed no error; certainly none of which the plaintiffs could complain.

Ejectment from Stewart county. Tried before Judge KIDDOO, October 24th, 1857.

This case came on upon exceptions to the rulings, by the Judge of the Superior Court, admitting certain evidence and documents upon the trial in the Court below.

The plaintiff at the trial introduced a witness who testified that the defendant took possession of the land (the subject of the action,) in 1854 or 1855, and that he had retained it ever since. He also introduced a copy grant of the land, which was to "David Mathis of Dodge's district, Appling county," and certain deeds under which he claimed title to the land, viz: a deed dated in 1852, of David Mathis of Hamilton county, Florida, to Jesse Mobley—a deed from Jesse Mobley to Seaborn Hall—a deed from Seaborn Hall to James M. Wharton.

Plaintiff then closed.

The defendant introduced a witness named Smith, who testified (among other things) that he acted as Commissioner in executing a set of interrogatories in the case in which Bunyan Mathis was the witness; and that he did this at the request of Samuel W. Molder, (who was stated to be warrantor to the defendant of the land in question.)

"That Molder and the witness and the commissioners were in a room together, that Molder conversed with the witness about the case, and his testimony; that when the commissioners commenced taking down the testimony of the witness, Molder walked into another room in the same house, the door of the room in which witness was opening into the room where Molder went, and remained open all the time; that when the commissioners got through taking down the testimony of said Mathis, Molder came back into the room where they were." The witness also testified that he knew the reputation of Bunyan Mathis for truth in the neighbor-

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hood where he lived, and that he would not believe him on his oath in a Court of Justice.

The following note was made by the Judge on the margin of the record opposite this testimony. "The Court's recollection is that the commissioners and witness went into a room, and that Molder, though he had conversed with witness, did not enter the room till the interrogatories were executed.—

D. K., *J. S. C. P. C.*"

This witness also testified that he had been living in Hamilton county, Florida, ten years, and for three years, had been tax assessor and collector, for the county, and that he had never known any man living there named David Mathis, but had known a man living there named Bunyan Mathis.

The defendant then offered in evidence the answers of Bunyan Mathis to certain interrogatories. To the reading of these, the plaintiffs counsel objected on the ground that Samuel W. Molder was present at the time of their execution as testified to by Smith one of the commissioners. This objection was overruled by the Court and the plaintiff's counsel excepted.

After reading the evidence of several of the witnesses, the defendant's counsel offered to read in evidence to the jury the answers of John G. Smith to certain interrogatories. To this the plaintiffs counsel objected, on the ground that it appeared by the answers that the interrogatories were taken out and executed in another case then pending in that Court, as they were headed with the title of that other cause. The Court overruled this objection, and the plaintiffs counsel excepted.

The following note appeared on the margin of the record, made by the Judge of the Superior Court—"Notwithstanding the misstatement in one place, there was evidence appearing on the same, that they belonged to this case.

DAVID KIDDOO, *J. S. C. P. C.*"

Defendant's counsel having closed his case, the plaintiff's counsel (having no more evidence) opened the case to the jury, insisting (among other things) that defendant was not entitled to anything for improvements, as he had not shown any written title or deed to the premises in dispute.

The argument before the jury having been closed, both by counsel for the plaintiff and defendant, and when the Court was about commencing to charge the jury, defendant's counsel moved to introduce in evidence to the jury certain deeds; one of the counsel for the defendant stating that he had said deeds in his possession at the beginning of the case, intending to introduce them in evidence to the jury, but had omitted to do so, and still had the deeds in his possession.

The following note appeared on the margin of the record made by the Judge: "Court thinks forgotten, as well as omitted.
D. K., J. S. C. P. C."

The plaintiffs counsel objected to the admission of these deeds in evidence to the jury. The Court overruled this objection, and allowed the deeds to go in evidence to the jury.

Defendant's counsel then introduced in evidence to the jury, a deed of the lot of land from Jeffrey Barksdale to John Barksdale, a deed from John Barksdale to Samuel W. Molder, and a deed from Samuel W. Molder to the defendant, William B. Colbert. Plaintiff's counsel then and there excepting.

The jury found for the defendant; and plaintiff filed his bill of exceptions, saying that the Court erred:

1st. In not rejecting the answers of Bunyan Mathis to certain interrogatories and in allowing said answers to be read in evidence to the jury.

2d. In permitting the answers of John G. Smith to certain interrogatories to be read in evidence to the jury.

3d. In allowing the deeds from Jeffrey Barksdale to

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John Barksdale, from John Barksdale to Samuel W. Molder, and from Samuel W. Molder to William B. Colbert, to be introduced and read in evidence to the jury after the argument of counsel before the jury had been closed, and when the Court was about commencing to charge the jury in said case.

4th. In allowing evidence to go before the jury after argument of counsel and when the Court was about charging the jury, it had been announced by counsel for plaintiff in their opening speech to the jury that defendants had exhibited no written title or deed to the premises in dispute, and were not on that ground entitled to anything for improvements.

TUCKER & BEALL, for plaintiff in error.

B. S. WORRILL, and JAS. JOHNSON, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

The tenant claimed under Molder by a deed with warranty. Molder was taking part in preparing the defence. Molder, therefore, bore towards the case a relation of the same sort, as that borne by the tenant. Therefore, whatever would, if done by the tenant, vitiate the execution of interrogatories would, if done by Molder, equally vitiate the execution of the interrogatories.

[1.] Did what was done by Molder in this case vitiate the execution of the interrogatories for Bunyan Mathis? The Court below thought that it did not, but we think that it did.

Molder was within ear-shot of the witness, and no doubt, known so to be by the witness. He had conversed with the witness about the case, and about his testimony; that is, the witness had told him what he would swear to. His position in the adjacent room, was a good one to enable him

to have the pledge redeemed. The case is in no respect different, so far as principle is concerned, from what it would have been if Molder had been in the room itself in which the testimony was being taken. See 19 Ga. R. 630.

We think then, that the Court erred in not rejecting the interrogatories of Bunyan Mathis. Does it follow that we ought to grant a new trial? This question will be considered in conclusion.

The next exception was to the decision allowing the interrogatories to John G. Smith to be read to the jury.

The objection to these was, that the case stated at the head of the *answers*, was not the same as the case on trial. The difference being, that in the case on trial, the tenant was *Colbert*, in the case as stated at the head of the answers, the tenant was *Brooks*. But the Judge certifies that there was evidence appearing on the answers, that they belonged to the case on trial.

The *questions* it seems were in the right case. If the answers were answers to those questions, they, we may presume, were also in the right case, whether headed so or not.

[2.] We see nothing in this objection.

The Court allowed the defendant to lay evidence before the jury after the close of the argument to the jury on both sides. This was excepted to by the plaintiff's counsel, but they expressed no surprise at the evidence. They asked for no continuance to enable them to meet the evidence.

[3.] This being so, we think that there is nothing that they can complain of in the decision. The subject of the order and mode of introduction of testimony is one committed to the discretion of the Court. We see no abuse of that discretion here.

Besides this evidence had no effect. It was offered as an answer to the demand of the plaintiff for *mesne profits*; the verdict was for the defendant generally.

This disposes of all the exceptions—only one of which,

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has been found to be good, that, to the admission of Bunyan Mathis's interrogatories.

Ought we to grant a new trial on the score of the improper admission of these interrogatories? The defendant's counsel says not. He says that there was evidence enough over and above these interrogatories to have required the verdict to be as it was; and that as there was no motion for a new trial, the case does not fall within the new trial Act of 1854, and therefore, that this Court must be governed by the common law rule, which forbids a verdict to be disturbed on the ground of illegal evidence, if there was sufficient legal evidence.

This we think is a good argument, if it be true that there was enough evidence over and above these interrogatories to require this verdict.

Is that true?

The plaintiff's own evidence showed that he claimed under David Mathis who in his deed made in 1852, described himself as of Hamilton county, Florida.

The grant was to "David Mathis of Dodge's district, Appling county." The testimony of several witnesses taken together traced up this David Mathis to the time of the suit, and showed him from 1826, or 1828, a citizen of some place in Georgia. It could not be, therefore, that it was he, who was the David Mathis of Hamilton county, Florida, in 1852, who made the deed under which the plaintiff claimed. It follows that that deed could convey no title.

Now the evidence, exclusive of Bunyan Mathis's interrogatories shows this.

And this is enough to require of the jury to find for the defendant.

We think then, that the counsel for the defendant is right in insisting that there ought not, on the ground of the admission of this evidence, to be a new trial.

So we affirm the decision of the Court below.

Judgment affirmed.

EDMUND C. CORBETT, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

[1.] The Superior Courts in this State have the same power, in relation to bail in criminal cases, as the Courts of King's Bench in England.

[2.] The Court of King's Bench in England, and the Superior Courts in this State, have the power to grant bail in all bailable cases, until the accused is in execution.

Indictment for forgery, from Muscogee county. Decided by Judge WORRILL, in November Term, 1857.

Bail after verdict of guilty.

A true bill was found against Edmund C. Corbett, charged with demanding payment of a forged note. Corbett gave a bond with ample sureties, as required by the Court, to appear and abide the judgment of the Court. Upon the trial, at November Term, 1857, the jury returned a verdict of guilty against Corbett, and upon the return of this verdict, the Judge ordered him into the custody of the Sheriff. To this order Corbett and his sureties objected. After this order, and during the pending of a motion in arrest of judgment, Corbett moved the Court to be admitted to bail, offering to give a bond to any amount the Court might require, with good sureties. This motion the Court refused, on the ground that the case was not bailable at law after a verdict of guilty had been rendered.

To this order and decision Corbett by his counsel excepted.

HOLT & HUTCHINS; WELLBORN, JOHNSON & SLOAN; RAMSAY & CARITHERS, for plaintiff in error.

Sol. Gen. OLIVER; and DOUGHERTY, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] It never has been doubted but that the Superior Courts in this State have the same power, in relation to bail in crimi-

nal cases, as the Court of King's Bench in England. And it seems that that Court may, in its discretion, admit to bail persons attainted of felony, or convicted thereof, by verdict general or special, where there is some special motive to induce the Court to grant it. And this power continues until the person is *in execution*, or punished with imprisonment for the offence.

It will be readily perceived, that it is impossible for this Court to specify the circumstances which will authorize the Court to act. Each case must depend on its own merits. We will cite the examples which are mentioned in the books, by way of illustration.

If one be convicted of felony, upon evidence, by which it plainly appears to the Court that he is not guilty of the crime, or where the prisoner may be in danger of losing his life, either by famine or dangerous distemper, unless he be bailed, in such cases the authorities are, that the Court will admit to bail after verdict.

[2.] In short, the law is this: The Court has the *power* to grant bail in allailable cases, until the accused is in execution. But this discretion must be exercised or refused in each particular case, according to the facts which attend it.

Understanding the judgment as we do, that the Court based its decision upon the want of power in the Court to admit to bail in an infamous crime, after verdict, we reverse the judgment, for the purpose of settling the law, as we understand it.

The whole subject is under the control of the Court. It may order a new bond, or the old bond to be strengthened. The end being, not punishment before final judgment, but security that the offender shall not escape. In many cases, ample bail would, perhaps, afford better security than the four walls of one of our rickety jails—but few of which are proof against internal and external assaults, and still fewer, to the *golden key* which unlocks prisons at pleasure. And the punitive power of the law never will be fully felt, until a criminal jail for each Judicial Circuit is constructed—built

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and occupied, or otherwise guarded—after the fashion of the most improved city prisons.

In this very case, at this Term, this Court has, by its solemn judgment, pronounced that Corbett was illegally convicted. And that the judgment of the Court, upon the verdict finding him guilty, should have been arrested, upon the ground, that the indictment charged no offence, under the penal code. Did the law make it *imperative* upon the Court to incarcerate Corbett before his rights were finally adjudicated? We think not.

Judgment reversed.

THOMAS STOCKS, and others, plaintiffs in error, vs. WILLIAM P. YONGE, and others, defendants in error.

When, upon application for that purpose, the Chancellor refuses to grant an order, taking a bill *pro confesso*, and this Court can see sufficient reasons in the record to justify his refusal, the Court is bound to affirm his judgment, whether it be the reason that influenced his decision or not.

In Equity, from Muscogee county. Decided by Judge WARRILL, May Term, 1857.

The bill of exceptions in this case was filed against the decision in the Court below, refusing to take a bill *pro confesso*, as against Seaborn Jones, one of the defendants thereto, under the following circumstances:

At May Term, 1856, an agreement, which was entered on the minutes and made an order of Court, was entered into between the counsel for the parties, that the defendants should, at the next term of the Court, plead or demur to the bill, and that if the pleas or demurrer or both were overruled, then, that the defendant should, within five days thereafter,

file a full and complete answer to the bill, and the case set down for trial at the same term. At the following Term, in December, 1856, a demurrer was filed to the bill, which was overruled, but no answers were filed according to the terms of the agreement. At the May Term, 1857, exceptions were taken to the answer of Seaborn Jones, one of the defendants, which exceptions were sustained by the Court, and the defendant ordered to "answer the exceptions by jury hours on Thursday next." This order bore date, on the record, the 19th day of June, 1857, but from the certificate of the Clerk of the Superior Court at the foot of the docket, it appeared that the Court adjourned its May Term on the 13th day of June, 1857, so that the date of the order, as it appeared on the record, must have been wrong.

During the same Term, the plaintiffs moved the Court to take the bill *pro confesso*, as against Seaborn Jones, on the ground that he had not filed a full and complete answer to the same, as required by the agreement which had been made an order of the Court in May Term, 1856. The Court refused to grant this motion, and to this decision the plaintiffs excepted.

WILLIAM DOUGHERTY, for plaintiffs in error.

JONES & JONES, *contra*.

Judge BENNING having been formerly of counsel in this case, did not preside.

By the Court.—LUMPKIN, J. delivering the opinion.

This is a bill in equity which has been pending in Muscogee county for many years. At the June Term, 1856, of said Court, it was agreed by counsel in the case, that the defendants should have until the first day of the next Term to demur or plead to the bill as amended, and if the same should be overruled, that then, within five days after the decision was made, the defendants were to file "a full and complete

answer" to the bill as amended; the complainants were to file a replication to the answer, and the case to stand for trial at that Term, and on failure to file said answer, it was to be the privilege of the complainants to take the bill as confessed, if they saw fit to do so.

On the 13th day of December, 1856, that being the next Term of the Court, it seems that a demurrer was filed, and overruled by the Court; and it does not appear that any other or further proceedings were had at that time.

Now, the bill of exceptions states, that at the May Term, 1857, of said Court, "and on a certain day in said Court," without designating the day, a motion was made to take said bill as confessed, against Seaborn Jones, one of the defendants, and proceed to trial, inasmuch as the said defendant had not filed a full and complete answer, as he was required to do by the agreement at May Term, 1856, already referred to. The Court refused to grant the order, and that decision is brought up to this Court by writ of error, and the same is now assigned as error. No reason is given by the Court for refusing to grant the order. But to obtain a reversal, the complainants' solicitor relies, with confidence, upon the judgment of the Court itself, and of record, to show that the answers of the defendant was not "full and complete," and that therefore, according to the agreement, he was entitled to his order. The entry, after stating the case, runs thus: "Exceptions to the answers of Seaborn Jones, to amendment; after hearing argument of counsel, it is ordered that the exceptions be sustained." But, unfortunately for the complainants' solicitor, he has overlooked the balance of the entry which, as we shall see, has an important bearing upon his application to take the bill as confessed. The entry continues and concludes as follows: "And that the defendant answers said exceptions and amendment by jury hours on Thursday next."

This interlocutory order upon the exceptions, bears date the 19th of June, 1857, when it is certified by the Clerk that

that Term of the Court was adjourned on the 13th of the month, or six days previous to the date of the order. Let us presume then that there is a mistake as to the date of this order, and that it was taken sometime during the Term. It will be recollected, that the bill of exceptions fails to state upon what day of the Term the application was made to take the bill as confessed, and let it be further remembered, that inasmuch as the order sustaining the exceptions to Colonel Jones's answer, bears an impossible date, and then we are left equally in the dark as to the day when that was taken. That order, we have seen, does not merely sustain the exceptions to the defendant's answer, and stop there; but it gives him till a future day to perfect his answer.

Now then, how does it appear but that the solicitor of the complainants made his motion, taking the bill as confessed, before the time had expired allowed to the defendant to perfect his answer? And are we not warranted in presuming in favor of the refusal of the Court to grant the order *pro confesso*, that such was the fact? It may be said that the Chancellor had no right to enlarge the time, nevertheless he did it, and that decision is not excepted to. The complainants are bound by it.

Other reasons may have influenced the Chancellor. The complainants having failed to enforce their rights, under the agreement, at the December Term, 1856—the Term to which the agreement had reference—the Chancellor might have supposed that the complainants had waived all rights resulting from that agreement.

Again, why, instead of excepting to the answer, as not full and complete, did not the complainants' solicitor move directly to take the bill as confessed, on account of the defectiveness or insufficiency of the answer? Why except, unless he himself desired a more full and perfect answer? And why allow time to be extended to the defendant, to perfect his answer, in compliance with his exceptions?

But the first ground, upon which we sustain the judgment,

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is enough, and unanswerable. It should appear affirmatively, and the *onus* is upon the plaintiff in error, that the *pro confesso* motion was not made, until the time had elapsed which was allowed the defendant to complete his answer.

As there is some confusion in the record, and the Court is always unwilling to dispose of a case upon erroneous data, the offer was made to the solicitor of the complainants, by the consent of the solicitor of the defendants, to hear this case *de novo*, upon the sufficiency of the answer, and to affirm or reverse the judgment of the Court below accordingly. But the overture was declined, and we were remitted to the record as it stood, to make up our opinion. And looking to that, we see no reason for overruling the judgment of the Court below, in refusing to grant the order moved for, to take the bill as confessed.

Judgment affirmed.

A. B. RAGAN, assignee, plaintiff in error, vs. R. R. CUYLER, administrator &c., defendant in error.

- [1.] A judgment reversing another being itself reversed, the first judgment is reinstated, and will be considered final, after the lapse of ten years, notwithstanding at the instance of the defendant, it is remanded for further proceedings, none having been instituted within that time.
- [2.] Where the Court either foreign or domestic, has jurisdiction over the subject matter of the action, and of the person of the defendant, and the defendant is served and appears by counsel and pleads to the merits of the suit, the judgment will not be set aside because the verdict upon which it is rendered, is contrary to evidence.

Debt, upon foreign judgment, from Muscogee county, tried before Judge WORRILL, at May Term, 1857.

The facts of this case, are sufficiently stated in the opinion of the Court.

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The Jury, under the evidence and charge of the Court, found for the plaintiff, and defendant moved for a new trial, on the following grounds.

1st. That the Court erred in not charging the jury that the verdict and judgment rendered in the county Court of Alabama, were void and of no legal effect, because they were rendered after the judgment of forfeiture had been rendered against said Planters and Mechanics Bank of Columbus, and without any party defendant being made in said case.

2d. Because the Court erred in charging the jury that the verdict and judgment rendered in said County Court of Alabama was proper and competent evidence to be considered by the jury to establish the plaintiff's demand against the Planters and Mechanics Bank, although the verdict and judgment against said Bank, in said County Court, were rendered after the rendition of the judgment of forfeiture against said Bank in Muscogee Superior Court, without making any party defendant in said case.

3d. Because the paper offered in evidence by plaintiffs purporting to be a record of a suit in Russell County Court of Alabama, (and to the reading of which in evidence, defendant objected, 1st, that it was not duly and legally authenticated according to the act of Congress, and 2d, that it did not appear in said record that said suit had been terminated and final judgment rendered,) was permitted to be read in evidence to the jury.

4th. Because the jury found contrary to the law, the evidence, and the equity of the case.

The Court overruled the motion for a new trial, on all the grounds taken, and to this decision the defendant then and there excepted.

HALL; JONES & JONES; and WELLBORN, JOHNSON & SLOAN
for the plaintiff in error.

COOPER; and DOUGHERTY, *contra*.

Judge BENNING, having been formerly of counsel in this case, did not preside.

By the Court.—LUMPKIN J. delivering the opinion.

James Holford the intestate of Cuyler, sued out an attachment in Russell county, Alabama, against the Planters and Mechanics Bank, of Columbus Georgia, which was duly served and made returnable to the February Term, 1843, of the County Court. At that Term, there was an appearance for the Bank, by their Attorneys, Jones and Benning; and amongst other things it was pleaded, that there was no such corporation, as the defendant; at the next Term, in August, an issue was formed and tried upon this plea, and a verdict found for the plaintiff; and a judgment entered up for their debt. An execution issued, and other proceedings were had to enforce the judgment.

In 1847 Robert B. Alexander the assignee of the Bank, appeared and petitioned the Court, that rendered the judgment, to set it aside, upon the ground that the charter of the Bank had been revoked in June 1843 by the Superior Court of Muscogee county in this State, two months before the judgment was awarded against the Bank in Alabama. An issue was formed upon this petition, and the prior judgment was vacated and set aside; upon this decision, a writ of error, was prosecuted to the Supreme Court of Alabama; and at the June Term, 1847, it was adjudged by said Court, that upon a writ of error *coram vobis*, error cannot be assigned, which contradicts the record. That it could not be alleged, that a corporation, against which a judgment had been rendered, had ceased to exist previous to the rendition of the judgment, *that fact having been put in issue and determined in the judgment sought to be reversed.* 12 Ala. Rep. N. S. 28.

Accordingly the last judgment of the circuit Court was

reversed and at the desire of the defendant was remanded for further proceedings.

Suit is now brought upon the first Alabama judgment, against Ragan the present assignee of the Planters and Mechanics Bank, and successor to Judge Alexander, by R. R. Cuyler the administrator of Holford; the exemplification of the record from Alabama being offered in evidence, in support of the action, it is objected to by the defendant on the ground, that it does not show a *final* judgment in Alabama.

[1.] The second judgment reversing the first, being itself reversed, of course reinstates the first. True at the instance of the Bank or its assignee, the cause was remanded for further proceedings; that is to say, by him, should he see fit to institute any. And the Alabama Court, it is suggested intimated that some other remedy might be adopted. We do not so understand the remark made by the Judge who pronounced the opinion. He intended to say, we apprehend, that Alexander as assignee could not be affected as such, by a judgment rendered against the Bank. But be this as it may, some ten years transpired and no further steps were taken in the cause. We are bound to presume that the defendant abandoned his intention, if he ever had any, to litigate further relative to the county Court judgment. We hold therefore that the Alabama judgment was final, and the exemplification admissible to prove the judgment.

[2.] The only other question grows out of the charge of the Court and its refusal to charge as requested, as to the force and effect of the Alabama judgment. Could the Court below go back of that judgment and inquire whether or not, it was not contrary to evidence? For such is the substance of the request.

That Courts may do this, in some cases is not denied. (See *Borden vs Fitch*, 15 *Johns Rep.* 121, where this whole doctrine is fully discussed.) But here the Court in Alabama had jurisdiction, both of the subject matter of the action and of the person of the defendant. The defendant had due and

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legal notice of the proceeding, appeared by attorney and put in issue the very fact which is now relied on to destroy the force and effect of the judgment, namely ; the corporate existence of the Bank at the time of the rendition of the judgment

To allow this would be to bring about a collision between the Courts, not only of the different States, but of the same State which would be deplorable. Judgments would be of no binding efficacy whatever. It is asked with apparent triumph, how could the civil death of the corporation be plead in February, 1843, when the judgment upon the *quo warranto*, was not rendered against the corporation until June thereafter? It is easy we apprehend to explain this apparent anachronism. The death of a natural person, could not be anticipated but the information against this artificial person had been filed, and it was foreseen, that in the due course of events, final judgment would be rendered before the trial in August, of the case in Alabama. Hence instead of waiting and pleading *puis d'erien continuance* as the defendant might have done, the defence was made in advance, and the plaintiff, as the record shows, instead of demurring, took issue upon the plea and fact as to the existence of the corporation in August 1843, notwithstanding the judgment of ouster in June before, was found against the defendant, and all that can be alleged against it now is that the verdict and judgment were contrary to evidence. But that is no ground for vacating the judgment, and my colleague with all the facts before him would have found against the plea, believing as he does, that the corporate existence of the Bank, was not annulled until the franchises granted by its charter were actually seized by the State. Upon that subject I have formed no opinion.

Judgment affirmed.

Watkins et al. vs. Watkins et al.

WILLIAM WATKINS, ZACHARIAH WATKINS, JESSE WATKINS and ERWIN WATKINS, plaintiffs in error, vs. GEORGE WASHINGTON WATKINS and JAMES E. BROADNAX, defendants in error.

[1.] An agreement to settle a doubtful right constitutes a valid consideration to support a contract; especially if it be an agreement to settle a family controversy; such an agreement will not be considered voluntary and without consideration, but will be enforced in equity as a fair family arrangement, independent of its being a compromise of doubtful rights.

[2.] When an agreement is entered into, upon sufficient consideration to sell real and personal property and divide the proceeds, and the same has been fully performed, on one side, the other party will be decreed to execute it in full, notwithstanding the agreement is by parol, and relates to land as well as negroes.

In Equity, from Muscogee county. Decision on demurrer by Judge Worrill, May Term, 1857.

This bill was filed in the Superior Court of Muscogee county, by the four elder sons of Samuel Watkins, deceased, against his two younger children, seeking the specific performance of an agreement. They stated in their bill that Samuel Watkins died leaving six children, four by his first, and two by his second wife, and by his will left all his property, real and personal, to his wife for life, and afterwards to his two younger children. That the wife subsequently gave up all her claim to the life estate in the property, given to her by the will, so that the same vested immediately and absolutely in the two younger children. That being satisfied that Samuel Watkins (who was an old man and imbecile) had been unduly and fraudulently influenced in the making of his will, they (the plaintiffs) came to the determination to enter a caveat against the same and to contest its validity. That when this determination was made known to the defendants they knowing (as the plaintiffs believed they did know) that said caveat, if filed, would be successful, and the will set

aside, in July, 1855, agreed with the defendants that, in consideration of the plaintiffs omitting to file the caveat, they would sell the land and four negroes belonging to the estate and equally divide the proceeds of the sale with them, and that they, the plaintiffs, agreed that they would not file the caveat, or make any other objections to the will. That at the time this agreement was made, one of the plaintiffs, Erwin Watkins, resided in Arkansas, and received a letter from George Washington Watkins, one of the defendants, telling him that the old lady had given up her life estate, and that he and Broadnax (the other defendant, who was the husband of a daughter of the testator) were in possession of the property, and entitled to it under the will, but that for the love they bore to all, they intended to divide the property equally between all the children; that the sale would take place on the 2d Monday in December next, and asking him to come and get his share. That in consequence of this letter, he, Erwin Watkins, came from Arkansas in order to attend the sale of the property, and to get his share. That at the time and place appointed for the sale, all the children attended, but the defendants refused to carry out the agreement. The prayer of the bill was that the defendants might be decreed to sell and divide the property in question, and thus specifically to perform the agreement.

To this bill the defendants filed a demurrer on the following grounds :

1st. Because there is no equity in the bill, and proper parties are wanting. Betsy B. Watkins should have been made a party.

2d. Because plaintiffs remedy, if any, is full, adequate and complete at common law.

3d. Because said Court has no jurisdiction of this cause as made by complainants, in their said bill.

4th. Because no decree could be had upon the pretended promise made by one of these defendants, as alleged by complainants bill, because said promise, if made, was made

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after the probate of said will, mentioned in complainants' bill, and was without any consideration, therefore a *nudum pactum*.

The chancellor sustained the demurrer and dismissed the bill, and to this decision plaintiffs excepted.

HOLT & HUTCHINS, for plaintiffs in error.

RAMSEY & CARITHERS, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

The case made by this bill is certainly not very strong: still we are disposed to hold it up for an answer, especially if it be amended so as to state more positively the grounds for attacking the will of Samuel Watkins. True, the complainants do allege they were satisfied that the testator was old and imbecile, and had been unduly and fraudulently persuaded and influenced to make the will: and that they had come to the determination to contest the validity of the will; and made known their intention to the defendants, who, knowing the fact that the paper proven as the will of their common father was not his will, and that it would be set aside upon a hearing, agreed to sell the property, or a portion of it, and divide the proceeds equally with complainants, provided they would forbear to caveat the will, and that by reasons of said undertaking they did forbear to institute proceedings to vacate the will.

It is argued by counsel for the defendants in error, that complainants have ample remedy at law by suing and recovering damages for a breach of the contract. It is apparent, however, that the redress at law is not so suitable or complete as in equity.

Again, it is contended that this is a *nude pact*; a promise without consideration. But the doctrine is, that an agreement to settle a doubtful right constitutes a valuable consid-

eration to support a contract. This too was an agreement to settle a family controversy, and in *Bailey vs. Wilson*, (1 *Dev. & Batt. Eq. Rep.* 182) it was held, Judge Gaston delivering the opinion of the Court, that if to prevent a contest about the probate of their father's will, certain brothers execute articles of agreement among themselves, providing for a more equal distribution of their father's estate, than that contained in his will, such agreement will not be considered as voluntary and without consideration; but will be enforced in equity as a fair family arrangement, independent of its being a compromise of doubtful rights. This case is very similar to the one at bar. The case of *Stapleton vs. Stapleton*, decided by Lord Hardwicke, proceeds upon the same principle. (1 *Atkins' Rep.* 10 and 11.)

[2.] As to its being an agreement concerning land, strickly this is not so; but it relates to a division of the proceeds of real estate, including personalty also. Besides, to say nothing of the expense and trouble incurred by one of the complainants, in coming in from Arkansas, to attend the sale and division, the complainants had executed fully the agreement on their part, by forbearing to file their caveat. It would be a fraud upon them not to compel its performance by the defendants. In *Neale vs. Neale*, (1 *Keen.* 68,) the agreement was by parol, and related to land; still its execution was decreed.

Judgment reversed.

 McGehee vs. Polk et al.

ABNER McGEHEE, Exe'or., &c., plaintiff in error, vs. WILLIAM POLK, et al., defendants in error.

- [1.] When a bill praying for a writ of *ne exeat* is verified in the usual form of affidavits to bills in equity, resort must be had to the charges in the bill to decide whether the facts are sufficient to entitle the complainants to the writ.
- [2.] By the English writ of *ne exeat regno*, the defendant was bound not to go beyond seas without leave of the Court; the act of 1830 allows an alternative, viz: to give bond for the eventual condemnation money.
- [3.] In bills for account and administration of assets, no certain balance need be sworn to, to entitle the complainants to the writ of *ne exeat*. It is sufficient if there is a clear affidavit of assets received.
- [4.] The will of the testator having been proven in Georgia, and letters testamentary issued in this State, where the testator died, and the executor and legatees lived at the time, and the property being all situated here, the Courts of this State will not surrender their jurisdiction over the person of the trustee, and remit the *cestui que trusts* to a foreign power, notwithstanding the voluntary removal of the trustee thither.
- [5.] In a bill praying a *ne exeat*, it is enough, that it is distinctly stated that the defendant resides out of the State. Danger of loss will be inferred from that fact alone.

In Equity, from Muscogee county. Decided by Judge WORRILL. November Term, 1857.

The bill of exceptions in this case was filed by Abner McGehee, against the decision of the Court below, refusing to dissolve a writ of *ne exeat* which had been issued against him. The following are the facts of the case:

Jefferson J. Lamar died in the county of Stewart, Georgia, in December, 1840, having, by his will, made shortly before his death, appointed Abner McGehee and Thomas Lamar, both of the said county of Stewart, his executors, and on the 6th of January, 1841, the said will was admitted to probate in the Court of Ordinary for the county of Stewart. On the same day A. McGehee was duly qualified, and on the 7th of January, 1841, letters of administration were granted to him. On the 3d of May following, Thomas Lamar, the other executor, was also qualified, and letters of administration were

granted to him, but he never interfered in the management of the estate. Appraisers were appointed by the Court to appraise the estate, and they valued the property, real and personal, at \$172,481 48. The whole of the estate was taken possession of by McGehee, who at once proceeded to sell and convert into money nearly the whole of the property. Shortly afterwards A. McGehee removed to Muscogee county, carrying with him the whole of the proceeds of the estate, which had been sold, and some negroes he had not disposed of, and caused the administration of the estate to be transferred to Muscogee county. In 1842, he made a return of a portion of the sales and of some disbursements, but did not verify the same by affidavit, or the filing of vouchers, and shortly afterwards removed to Alabama without any action of the Court having been taken on this return.

Jefferson J. Lamar, the testator, left two children, Lucius Mirabeau Lamar, and Rebecca Eveline, who subsequently intermarried with William Polk, and by his will gave all the residue of his property, after certain specific legacies, to these two children, share and share alike, and directed his executors to pay over one-half of his son's share to him when he attained the age of 21, and the other half when he had attained the age of 26, unless his executors, in the exercise of a sound discretion, might deem it expedient to pay over the same at an earlier period. And as to the share given to his daughter, the testator directed that his executors should hold one half of the same to the sole and separate use of his daughter free from the control of any husband with whom she might intermarry, and if they should deem it expedient, he directed then to appoint two or more fit persons to hold the same as trustees for the same; and as to the other half, the testator directed that his executors should place it in the hands of her husband free from all trusts or incumbrances.

In the month of May, 1857, the said Lucius Mirabeau Lamar and William Polk, as trustee for the said Rebecca Eveline, his wife, filed their bill in equity against the said Abner

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McGehee. The plaintiffs, in their bill, set out the facts above stated, and also certain sales of the trust estate and investments of the trust funds, and other dealings of the said Abner McGehee, in respect of the estate of the said Jefferson J. Lamar. That from information derived from valuations by accountants, they believed that the assets of the estate in the hands of the said Abner McGehee, amounted to between 400 and 500 thousand dollars. That McGehee, though frequently requested so to do, had totally failed to pay over or invest the several portions of the estate according to the provisions of the said will, and that with the exception of certain small amounts (set out in the bill) McGehee had paid over nothing to either of the children of the testator. They also stated, that McGehee resided in Alabama, and although notified by the Court of Ordinary of Muscogee county, so to do, had made no returns of the estate, except the informal one which he made in 1842. That McGehee had refused to inform either of the parties what the amount of the bequests were, and when urged so to do, had stated that he could not come within 40,000 of the amount of the estate which, of right, ought to be in his hands. The plaintiffs charged that from McGehee having removed from Georgia, carrying with him a large portion of the property, and from his having refused to account as to the condition of the estate, they apprehended that the funds were in danger; that if they proceeded against him before the Court of Ordinary, he would keep beyond the jurisdiction of the Court, and compel them to settle with him at any sacrifice he might choose to dictate; that the Court of Ordinary had no restraining power, and they could only have relief in a Court of Chancery. Under these circumstances they prayed that the said McGehee might answer to the facts stated in the bill, and might be decreed to account to the plaintiffs in respect of the trust estate in his hands, and to pay over or invest the trust estate according to the provisions of the will; and that a writ of ~~ne exeat~~ might be issued restraining the said McGehee from leaving the State of Geor-

gia until a final decree should be had, or until he should give security for the payment of the eventual condemnation money. They also prayed for an injunction to restrain the defendant from selling, or in any way encumbering the trust property in his hands, and for the appointment of a receiver.

The plaintiffs verified the facts stated in the bill by affidavit, in the usual form, that the facts stated in the bill, as of their own knowledge, were true, and that the facts stated as on the knowledge of others, they believed to be true.

On the 18th of May, 1857, a writ of *ne exeat* was issued against the said A. McGehee, under which he was, on the 9th of June, 1857, arrested, and gave bond and security to the amount of ———.

In November Term, 1857, McGehee moved the Court to dissolve and discharge the *ne exeat*, on the grounds,

1st. That the allegations in the bill were insufficient to authorize a *ne exeat*: and

2dly. Because the affidavit to the said bill was wholly insufficient to authorize the same.

The Court overruled the motion, and to this decision defendant excepted.

WELLBORN, JOHNSON & SLOAN, for plaintiffs in error.

MOSES & MOISE, and JONES & JONES, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

A bill having been filed against the plaintiff in error in this case, as Executor of Jefferson Lamar, deceased, by the complainants, as the only legatees under the will of the testator, a writ of *ne exeat* was prayed for and granted. A motion was made to discharge the *ne exeat*, upon two grounds: 1st. Because the allegations in the bill were insufficient to authorize a *ne exeat*: and 2d. Because the bill was not properly verified.

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[1.] The affidavit is in the usual form to bills in equity; namely, that "the facts stated in the bill as of the complainants' own knowledge, are true; and the facts stated, as on the knowledge of others, they believe to be true."

The two objections then, resolve themselves into one, and that is, whether the facts charged in the bill as coming within the knowledge of the complainants, and their belief as to the truth of the facts, founded on the knowledge of others, are sufficient to entitle the complainants to the writ of *ne exeat*?

[2.] I would remark that objection has been made to the form of the bond in this case; the conditions of which is, that the party "shall not depart the State, or that he will pay the eventual condemnation money."

While we do not consider this point legitimately made upon the record, we may say, that the bond is in exact conformity to the act of 1830. (*Cobb*, 527.). The words of the statute are, "in all cases where persons may be hereafter arrested, they shall be discharged on their giving bond with good and sufficient security, either that they will not depart the State, or for the payment of the eventual condemnation money." By the English writ of *ne exeat regno*, the defendant was bound not to go beyond seas without leave of the Court. (*Beames on ne exeat regno*, pp. 18, 19.) The act of 1830 is a relaxation of the English law, in allowing an alternative, viz: to give bond for the eventual condemnation money.

The law may, or may not be too rigorous. It is not in the power of the Courts to alter or mitigate it.

[3.] It is contended that no sum is set forth in the bill, with sufficient certainty. The complainants attach the inventory and appraisement to the bill, state the various sales of property, and after setting forth details, as far as it was in their power to do, they claim between four and five hundred thousand dollars to be now due them, upon a fair accounting by the executor. If they cannot be more specific, the fault is

not theirs. The executor has made no return since 1842! And only an informal one then; not verified nor approved by the Court of Ordinary. And when called on by the complainants to ascertain the balance coming to them, the executor replied, that he could not come within \$40,000 of the amount! Surely the complainants will be excused from greater particularity under such circumstances. Indeed, under our legislation, if not before, certainty in this respect, is not indispensable. (*McGehee vs. McGehee*, 8 Ga. Rep. 299.) But even at common law, in bills for account and administration of assets, if there is a clear affidavit of assets received the Court will grant the writ of *ne exeat*. (*Beames*, 38.)

(4.) But it is argued that a *ne exeat* will not lie in this case, because the Courts in this State have no jurisdiction over the parties. If so the complainants are unfortunate, as they have no redress anywhere else. (See *Story's conflict of Law*, p. 513, and the authorities there cited; 15 *Peters' Rep.* 1.) It is suggested, that the State of Alabama has passed an act repealing the doctrine of the common law in this respect, and allowing a foreign trustee to be sued in that State. It may be so; no evidence of the fact has been submitted to this Court.

But suppose it be so. The will having been proven here and letters testamentary issued in this State, where all the parties lived, and where all the property was situated, will the Courts of this State surrender the jurisdiction which they have acquired over the person of this trustee and send the complainants to a foreign power? By no means. No such case has been cited. None such, we presume, can be found. and if such a precedent could be produced, it would be against principle.

The party undertook this trust in view of his accountability to the laws and tribunals of this State. He cannot, by his voluntary removal, transfer his liability elsewhere. The farthest that the Courts have gone is, that where foreigners meet in another State, of which neither are citizens, and un-

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dertake to enforce, by writ of *ne exeat*, a contract which was made with a view to its execution elsewhere, there they will be remitted to the place of its execution, for their remedy. (3 *Johns. Ch. Rep.* 74.) But this is not that case. On the contrary, this very authority in Johnson sustains fully the defendants in error, in the present proceeding.

[5.] It is not necessary either in a case like this, for the bill to allege that the complainants apprehend loss, although this is done; it is enough that it is distinctly stated in connection with the other facts, that the defendant resides out of the State. Danger of loss will be inferred from this fact. Still the jurisdiction does not rest upon that ground, but upon all the circumstances to which I have heretofore adverted.

We hold that the Court was clearly right in refusing to discharge the writ of *ne exeat*.

Judgment affirmed.

WILLIAM H. ODAM, administrator, plaintiff in error, vs. JESSE NELMS, defendant in error.

[1.] In England, the appellate Court will never refuse a new trial against the opinion of the presiding Judge who tried the cause; and there is nothing in the laws of Georgia which compels this Court to adopt a contrary rule. Where the verdict of the jury is strongly and decidedly against the weight of evidence, the Superior Courts *may* (not *must*) grant a new trial. It is not obligatory, even in that case to do so; they may, however, grant a new trial where the evidence preponderates in favor of the verdict.

Trover, from Baker county. Tried before Judge ALLEN, at December Term, 1857, on the appeal.

William H. Odam, administrator of Caleb Faircloth, deceased, brought this action of trover against Jesse Nelms for

the recovery of a promissory note, for four hundred dollars, made by Roger Hair and payable to deceased, and which plaintiff alleged was the property of his intestate, &c.

The testimony on the trial was very conflicting, as to the circumstances and terms upon which the note had been delivered to Nelms by Faircloth in his lifetime. The witnesses for plaintiff testifying, that it was placed in his hands for safe keeping. The witnesses for defendant swearing that it had been turned over to defendant as a payment or indemnity to him for taking care of and supporting the family of deceased, who were living at his house at the time of Faircloth's death,

Defendant's counsel requested the Court to charge the jury:

1st. That if they believed from the evidence that plaintiff's intestate delivered the note under an agreement that defendant was to support and maintain the minor children of deceased, that this was a good and valid consideration, and plaintiff was not entitled to recover: That whether defendant had supported the children or not, had nothing to do with the present issue—if he had failed so to do, the children could proceed against him under such agreement.

2d. That if the jury believed that defendant had a claim or lien upon the note, then he was entitled to retain it until his claim was paid, or the amount of it was tendered to him, and if this had not been done, the plaintiff was not entitled to recover. The Court gave in charge the first request, but refused the second.

The jury found for the plaintiff, and defendant moved for a new trial on the grounds:

1st. That the verdict was contrary to the evidence and against the weight of evidence.

2d. That the verdict was contrary to the charge of the Court.

3d. That the Court erred in refusing to charge, as requested by defendant.

After argument, the Court granted a new trial, on the grounds: 1st. That the verdict was against the charge of the Court: And 2d. That the Court erred in refusing to charge as requested by defendant's counsel.

To which decision granting a new trial plaintiff excepted.

STROZIER & SMITH, for plaintiff in error.

VASON & DAVIS, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

The Court in the exercise of its discretion saw fit to grant a new trial in this case; and the only question is, are we bound to control that discretion on account of its flagrant abuse?

In England, the appellate Court will never refuse a new trial, where the Judge who presided is dissatisfied with the finding. And there is nothing in the law of this State which constrains this Court to enforce a different rule. By the Act of 1853, the Superior Courts are clothed with power to grant new trials, where the verdict is strongly and decidedly against the weight of evidence. It is not obligatory to do so even in such a case. But they are not interdicted from granting new trials, even where the proof preponderates in favor of the verdict. In this case there is much conflict in the evidence.

Had the Judge refused a new trial, we are not prepared to say that we should have overruled his discretion. Still less are we disposed to do so, when he has remanded the cause for a re-hearing.

It may not be amiss to add, that there is some testimony that the note sued for was deposited by the intestate of the plaintiff, with the defendant, for the future and permanent support and maintenance of his younger children. If this be so, and the contract was of a character to render it irrevocable by Caleb Faircloth in his lifetime, in that event, a

trust would spring up in favor of these minors, which might be specifically enforced in favor of the minor children against the defendant, either pending the trover action, or at its termination.

So that should the jury ultimately find for the defendant, and thus abnegate the right of the administrator of Faircloth to the note; it does not follow, that the title to this paper would be thereby vested absolutely in Nelms.

I merely throw out this hint for as much as it is worth. If these orphan minors have rights, it would be a pity to have them overlooked or lost for want of being prosecuted.

Judgment affirmed.

WRIGHT, BULL & Co., plaintiffs in error, vs. ADDISON E. G. HARRIS and JOHN SAPP, executors of MORGAN CHASTAIN, deceased, defendant in error.

Where suit is brought against two defendants, one of whom only is served, and judgment is confessed by an attorney, and entered up by the plaintiff against the *defendants*, (plural,) instead of the defendant, it is competent to show upon a *scire facias*, to reverse the judgment against the executors of the party served, that the attorney making the confession, had no authority to represent the party not served.

A judgment against one of two partners, may be revived against the executors of the party against whom the judgment was rendered, and the plaintiff is not driven to pursue his remedy against the surviving partner.

The facts of this case are fully stated in the opinion of the Court.

HINES & HOBBS, for plaintiff in error.

SLAUGHTER & ELY, for defendant in error.

Wright, Bull & Co. vs. Harris and Sapp.

By the Court.—LUMPKIN, J. delivering the opinion.

Suit was brought in 1840, in Baker county, in favor of Wright, Bull & Co., against the firm of Harvey & Chastain, on a partnership note of the defendants. Both defendants were alleged to be residing in Baker county. Chastain one of the defendants was served personally. There was no return as to Harvey. It is now admitted in writing on the record before us, that Harvey did not at that time live in Baker county when the case was called at the docketing Term. Mr. Strozier, an attorney at law, answered to the case. No plea was filed. Mr. Strozier subsequently confessed judgment for the *defendants*, (plural;) and judgment was signed up against the *defendants* (plural again.) Execution issued a few days thereafter against Chastain alone; and a return of *nulla bona* made thereon. And the case has thus stood until 1857, when a *scire facias* was sued out against the executors alone, of Chastain, to revive the dormant judgment, he having in the meantime died.

Three objections are made to this proceeding:

1st. Because the judgment was joint against the defendants testator, and John P. Harvey, when it appeared by the record, that Harvey was never served.

2d. Because the judgment being joint, the plaintiffs cannot revive it against one; and that Harvey ought to be made a party.

3d. Because being a joint judgment on a partnership debt, it cannot be reversed against the defendants, as the representatives of their testator, Chastain, he being dead, and John P. Harvey being still in life; he alone is liable as survivor.

Upon argument, the *scire facias* was dismissed by the Court.

Was the judgment in this case joint? The objections urged against its renewal, assume that it was. Still the first objection asserts what is true, that it appears from the record,

that Harvey was not served. Well, this may be true, and still the judgment be joint. If Mr. Strozier had authority to represent Harvey in the case, and actually did represent him, in that event, the judgment is joint; for want of service may be waived by appearance and answering to the action. This case then, turns upon the fact, as to the authority of Mr. Strozier to represent Harvey. If he had authority, we repeat, the judgment is joint, and the *scire facias* was properly dismissed.

Harvey not living in the county, and not being actually served, if he did not defend by counsel, the judgment is void as to him, but valid, under the Act of 1820, against Chastain individually, and against the partnership property of Harvey and Chastain. And under that act, the plaintiffs are entitled to have the judgment revived against the executors of Chastain, and are not driven by the rule of the common law to pursue their remedy against the surviving copartner. And if Mr. Strozier had no authority to represent Harvey, the judgment is single, and it is too late for Chastain's executors after the lapse of seventeen years, to object that no return was made by the Sheriff as to Harvey. (*Raney vs. McRae*, 14 Ga. Rep. 589.)

If we affirm the judgment of the Circuit Court and send this case back to be prosecuted against both defendants, upon the assumption, that the original judgment was joint, it is almost certain, that it will be defeated by proof from Harvey, that Mr. Strozier did not represent him; and that the appearance and confession for defendants, was a mere *lapsus pennæ*. The fact that execution issued against Chastain alone, shows the understanding of the plaintiffs at the time, that the judgment was against Chastain alone.

Instead then of remitting this cause to occupy the Courts through a series of years of bootless litigation, ever and anon re-appearing in this Court, as too many cases do, to the great and growing distaste of the country, we think it better to

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give the plaintiff the privilege of proving by Mr. Strozier what we might well in my opinion assume from the record to be true, that his confession of judgment for the defendants, instead of the defendant, was accidental, and not intended to bind Harvey. This being so, the plaintiffs are entitled to revive their judgment against the defendant originally served, and to make their money, if they can, out of the estate of Chastain, as well as out of the firm effects, if any can be found.

Judgment reversed, with directions.

BROWN & WRIGHT, plaintiffs in error, vs. SMITH & LEONARD,
defendants in error.

It is error in the Court to hear and determine a certiorari, six months before the Term, to which by law it is *properly* made returnable.

Certiorari, from Calhoun county, decision by Judge Allen, at November, Term, 1857.

Brown and Wright had sued out a certiorari from the Superior Court, directed to the Justice of the Peace of the 1123 district, requiring him to certify and send up to the Superior Court, to be held *on the 4th Monday in May next*, the proceedings in a cause, wherein exception had been taken to his judgment. The certiorari issued 13th November 1857, and served on the Justice 15th day of the same month.

At the November Term 1857, of the Superior Court of Calhoun county, the attorneys for Smith and Leonard, called up the certiorari for a hearing, counsel for Brown and Wright objected to the hearing or trial of the case, on the ground that the certiorari was returnable to the May, Term, 1858, of said

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Court, and that the cause was not in order for trial until that Term of the Court.

The objection was overruled, the case taken up and the presiding Judge dismissed the certiorari on *the ground that there was no error alleged therein*, and remanded the case with an affirmance of the judgment; and counsel for petitioners, Brown and Wright, excepted.

Richard H. CLARKE, for plaintiffs in error.

W. C. PERKINS, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

The petition for certiorari in the case was sworn to and filed the 12th of November 1857. The writ of certiorari was issued by the Clerk on the 13th and service acknowledged on the 15th of the same month. The Justices of the Peace whose judgment was complained of, were commanded to certify and send up their proceedings, to the the May Term, 1858, of the Superior Court of Calhoun county.

The only question for our opinion is, could the Judge of the Superior Court hear and determine the case, before the Term to which it was properly made returnable by law? See *Cobb*, 529.

We think not, and feel constrained to reverse his judgment on that ground. To decide otherwise, would be in effect to hold that a certiorari like an injunction may be heard at any time after it issues, a most inconvenient practice to establish even for the Judges themselves.

We fully concur with the Court below, that there were no errors complained of in the certiorari, and that it ought to be dismissed on that account, whenever according to law it can be reached.

Judgment reversed.

The State vs. Lockhart.

THE STATE OF GEORGIA, plaintiff in error, vs. WILLIAM H. LOCKHART, principal, and DAVID LOCKHART, security, defendants in error.

- [1.] The State has the right to prosecute writs of error to this Court, to all decisions in the Courts below, respecting bonds, recognizances &c., and all other matters, not strictly of a criminal nature.
- [2.] The obligor in a recognizance is not bound to appear before indictment.
- [3.] If an indictment for burglary omits to specify the felony, which the defendant intended to commit, the defect is fatal.

Scire facias to forfeit recognizance, from Taylor county.
Decision by Judge WORRILL, at October Term, 1857.

On the 29d Febuary 1857, William H. Lockhart was arrested on a charge of burglary and committed to jail; afterwards on the 25th of the same month, being brought out on *habeas corpus*, he was discharged upon recognizance in the penal sum of one thousand dollars, conditioned for his appearance at the next Term of the Superior Court, to be held in April, to answer such matters as might then and there be charged against him by Willis McLendon "concerning the attempt to break and enter the house of the said Willis with intend to commit a rape" &c., and not to depart thence without leave of the Court, &c. David Lockhart became his security in the recognizance.

At the April Term of the Superior Court, an indictment was handed out by the Solicitor General charging him with the crime of *burglary*. The grand jury returned "true bill." During the same Term of the Court the case was called in its order for trial, and defendant failed to appear. A *scire facias* issued, calling on the said William H. and David, to shew cause at the next Term of the Court, why their recognizance should not be forfeited. Both parties were served, but only the surety appeared, who showed for cause, that the indictment was defective, in this, that in said charge for burglary therein contained, no particular felony or offence is specified

or charged as being intended or attempted to be committed by accused.

The Court sustained the objection, and refused to give judgment of forfeiture; and the Solicitor General, for the State, excepted.

T. OLIVER, Solicitor General, for the State.

MILLER—*contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

Wm. H Lockhart was recognized to appear at the April Term, 1855, of the Superior Court of Taylor county, to answer for the offence of an attempt to break and enter the dwelling house of one Willis McLendon, with intent to commit a felony. At the Term of the Court when he was bound to appear, an indictment was preferred against him and found true by the grand jury, charging the accused with attempting to break and enter the house of McLendon, with intent to commit a felony, but without specifying what felony. Lockhart was called and failing to appear, a judgment *nisi* was taken against him. A *sci. fa.* was issued calling upon the defendant to show cause at the next Term of the Court why his recognizance should not be forfeited, and he be made the absolute debtor of the State, for the amount due on his bond. He showed for cause by his counsel, that no indictment had been found against him for the offence, described in his bond, nor for any other crime. The Court sustained the objection, holding the indictment a nullity and quashed the *sci. fa.* and to reverse this judgment, this writ of error is prosecuted.

[1.] Counsel for the defendants in error move, preliminarily, to dismiss the writ of error, upon the ground that it is a criminal case and consequently cannot be prosecuted at the instance of the State.

Without instituting any inquiry at present, as to the juris-

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diction of this Court over criminal cases, either as to what it is, under the organic act of 1845 or what it ought to be, by further legislation, we simply say, that this is not a criminal proceeding proper. True it springs out of one, and is conducted in the name of the State, and is a *quasi* criminal proceeding, still there is no reason of policy or otherwise, why this Court should not entertain jurisdiction over this and the like cases. It has done this heretofore, in numerous cases of like character.

But to the question upon the merits.

[2.] In *Liceth, et. al. vs. Cobb, Governor &c.*, 18 *Ga. Rep.* 314, this Court held that the defendant, was not bound to appear before indictment and that there could be no forfeiture of the bond before indictment, and that it is good ground of demurrer to a *sci. fa.* that it has issued before indictment. If then the indictment in this case was fatally defective, not only not charging the defendant with the particular offence for which he was recognized to appear, but with none other, then the party stands unindicted to this time, and there has necessarily been no breach of his bond.

[3.] Is an indictment for burglary sufficient, which fails to specify the particular felony which the accused intended to commit? The Judge held that it was not, and we are inclined to think he was right. This is matter of substance and not of form merely. The party should be notified of the offence for which he is prosecuted. Lockhart perhaps knew of the crime intended to be proven against him, and the ignorance pretended in all such cases, is usually feigned, a mere fiction in point of fact, and yet the public mind is not prepared for this innovation in point of pleading. The truth is, the breaking and entering the house, constitutes the main element of burglary, regardless of the purpose, for which it was done, still it is better—it may be we are bound by the law as it is—to sustain the decision of the Court below. Steps at legal, moral or any other species of reform, must not go too fast nor too far at once, otherwise the old and the timid are left

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behind and keep back a large portion of the masses with them.

We do not intend to hold that the bond taken in this case, is not still a valid obligation, that Lockhart shall appear, whenever the state shall see fit to indict him for the offence, set forth in the condition of his bond, provided of course that a true bill be found.

Judgment reversed.

JESSE STALLINGS, plaintiff in error, vs. A. & J. CARSON, defendants in error.

A witness saying that he is interested, does not disqualify him, when the facts show that he is not.

Assumpsit, from Taylor county. Tried before Judge WORRILL, October Term, 1857.

The jury in this case found for the plaintiffs, and defendant moved for a new trial, on the grounds,

1st. Because there is no evidence to support the verdict.

2d. Because the verdict is contrary to the evidence and law.

3d. Because the Court erred in admitting the evidence of Sampson S. Foy, who was interested in the event of the suit.

4th. Because the Court erred in neglecting to charge the jury, that any promise made since 1844, to take the case out of the statute of limitations, should be in writing.

The Court refused the motion for a new trial, and defendant excepted.

COOKE & MONTFORT; GRICE & WALLACE, for plaintiff in error.

Hose et al. vs. King and wife.

OWEN; and B. HILL, *contra*.

By the Court.—LUMPKIN J., delivering the opinion.

The only question in this case is, whether Sampson S. Foy was disqualified from testifying as a witness in this case, on account of his interest. For, notwithstanding the promise to pay, which was proven by Joseph Carson, may have been sufficient to entitle the plaintiff to recover, independent of the testimony of Foy, still, as a new trial was moved, if illegal testimony was admitted against the defendant, the Court is bound to remand the case for a re-hearing.

And it is true, that Foy says he was interested, but when he comes to disclose the nature of his interest, it turns out that he was mistaken. For he swears expressly, that if the money is not collected out of Stallings, that Robert Carson is to pay him. And it is not proven or pretended, that Robert Carson is not solvent. We hold, therefore, that Foy was a competent witness; and it is not denied but that if he was, his testimony took the case out of the statute of limitations.

Judgment affirmed.

JOHN HOSE, et al., plaintiffs in error, vs. JAMES H. KING and WIFE, defendants in error.

J. gives to his daughter C., one negro woman, Hester, together with her issue and increase, to her use, and the lawful heirs of her body forever; if she should die without leaving a lawful heir of her body, then the property to revert back to the estate, and be equally divided amongst testator's other heirs
Held, That under the Act of 1821, the daughter took an absolute fee in the property.

In Equity, from Houston. Decision on demurrer, by Judge WORRILL, at October Term, 1857.

This was a bill filed by James H. King, and his wife, Eliza King, formerly Eliza Engram, against John Hose and William F. Engram. The bill states that James Engram, Sen., of the county of Jefferson, departed this life in the year 18—, leaving in full force his last will and testament, one clause of which is as follows :

“ I also give and bequeath to my daughter, Cressy Engram, one negro woman, *Hester*, together with her issue and increase; also, one feather bed; bedstead, and furniture, and one saddle and bridle, for her use and the lawful heirs of her body forever; if she should die without leaving a lawful heir of her body, it is my will that all the property shall be reverted back to the estate, and be equally divided amongst my other heirs.”

The bill further states, that Mrs. King is the only child of the said Cressy Engram, named in the above clause. That the father of Mrs. King, the husband of said Cressy, has sold to defendants, the negro woman *Hester*, and several of her children and grand-children. That the said Cressy is still in life, but that complainants, as remainder-men under said will, are apprehensive that defendants will convey and remove said slaves out of the State, and thereby, their rights as remainder-men be endangered and destroyed. The bill prays, that defendants be restrained from removing said slaves out of the State, and that they be required to give bond and security for the forthcoming of said slaves, in their respective possessions, after the termination of the life estate.

The bill being verified by the oath of James H. King, one of the complainants, the Chancellor ordered defendants to enter into bonds and security, conditioned, not to remove said negroes from the State, and to have them forthcoming at the termination of the life estate.

The bill was afterwards amended, making Needham F

Hose et al. vs. King and wife.

Johnson a party, who had, collusively and pretensively, as alleged, purchased some of said slaves and removed them to a distant county, &c.

Defendants demurred to this bill, and for cause of demurrer, assigned that by said last will and testament of James Engram, the negro woman Hester and her increase vested absolutely in the said Cressy Engram, and upon which the marital rights of her husband attached, who had the right to sell and dispose of the same unconditionally and absolutely.

The Court overruled the demurrer, and defendants excepted.

WARREN & HUMPHRIES; BAILEY; KILLEN; GILES, for plaintiffs in error.

NESBIT; HALL; and PRINGLE, *contra*.

By the Court.—LUMPKIN J., delivering the opinion.

According to the construction put upon the statute *de donis*, by the English Courts, as to *real estate*, the limitation, over in this will, is too remote and void. And that under the Act of 1821, as expounded by a majority of this Court, (myself dissenting,) in *Gray vs. Gray*, 20 Ga. Rep. 840. Cressy Engram, the daughter of the testator, took an absolute fee in the negro woman Hester, and the marital rights of the husband attaching thereon, he had the right to dispose of the property by sale, and that consequently, the complainants in the bill have no interest therein. In other words, the bill must be dismissed for want of equity.

Judgment reversed.

EDWARD REYNOLDS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

Where the proof in favor of a defendant is stronger and more direct than the evidence against him, there is room for a reasonable doubt, at least, as to his guilt, and he ought not to be convicted.

Indictment, from Worth Superior Court. Tried before Judge POWERS, at October Term, 1857.

Edward Reynolds was indicted for changing the marks and brand of a hog belonging to Jackson J. Williams.

The defendant pleaded not guilty.

The testimony for the State was to this effect: That some time in February, 1857, Williams, with another, went to defendant's house and found the hog in a pen there; Williams claimed the hog; defendant said the hog was his own; that he had bought six hogs of Gale Hampton, marked with a split in one ear and an underslit in the other, and this was one of them, but if Williams would swear to it he would give it up. The defendant's mark was a split and an underslit in each ear; this hog's ears looked as if they had been recently cut, that is, that portion which changed it from Williams' mark to defendant's; the rest of the mark was old. That a short time before, defendant asked witness (Dykes) if he knew of any one who had hogs missing in the neighborhood, marked with a split in one ear and an underslit in the other.

For the defence: The testimony was, that the hog was in defendant's mark before it was put in the pen, and the marks were old.

Defendant's father, Elisha Reynolds, testified that the hog in the pen was defendant's; he had known it from the time it was *pigged*, and knows it was defendant's.

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The officer who arrested defendant, saw the hog in the pen ; did not see any sign of its being recently marked ; he did not examine it closely, but casually looked at in the pen with other hogs.

The jury found the defendant guilty.

Whereupon, he moved for a new trial on the grounds, that the verdict was contrary to law and evidence, and the charge of the Court.

The Court refused the motion for new trial, and defendant excepted.

H. MORGAN, for plaintiff in error.

Sol. Gen. T. W. MONTFORT, for the State.

By the Court.—LUMPKIN J. delivering the opinion.

We think the evidence on the part of the State too slight and uncertain to convict the defendant, and that he is entitled to a new trial. He may be a hog-thief, but the proof should be clear, to convict a citizen of the offence charged. Upon the testimony, there is certainly room to doubt the guilt of the accused. The proof for him is stronger and more direct than the proof against him.

Judgment reversed.

JESSE PITMAN, plaintiff in error, vs. **JACOB LOWE**, Adm'r., defendant in error.

Courts will not allow judgments to be amended by parol proof, particularly if the judgment has been satisfied, and much time has intervened since it was rendered.

Motion to enter judgment *Nunc pro tunc*, from Crawford. Decision by Judge POWERS. September Term, 1857.

At September Term, 1857, of Crawford Superior Court, Jesse Pitman moved for a rule against Jacob Lowe, administrator of Allen Marshall, deceased, to shew cause why he (Pitman) should not enter a judgment *nunc pro tunc*, for the interest upon a verdict obtained by him at August Term, 1850, against said Lowe, as administrator aforesaid.

Respondent showed for cause, that he had paid to said Pitman, on the 10th Oct., 1855, one hundred and twenty-three dollars and sixty-nine cents, in full of the *fi. fa.* issued on said judgment and verdict.

Pitman tendered and read in evidence the note upon which said verdict and judgment were rendered, as follows :

“\$200. By the 25th December, 1846, I promise to pay Jesse Pitman, or bearer, two hundred dollars, for value received. August 6, 1845.

[Signed]

ALLEN MARSHALL.

Endorsed—“Rec'd. on the within note fifty dollars, this January 12th, 1847.”

He further offered in evidence the declaration sued out on said note, returnable to May Term, 1847, of the Inferior Court of said county. Also the plea of set-off filed by defendant, and the verdict rendered by the jury who tried the case on the appeal, finding for the plaintiff \$91.80, with interest and cost of suit, with the judgment entered thereon, as follows :

“Superior Court, August Term, 1850. Whereupon it is considered by the Court that the plaintiff do recover of the

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defendant the sum of ninety-one dollars and eighty cents for principal debt, and the sum of ——— dollars and ——— cents, for interest, to ———, and the further sum of ——— dollars and ——— cents for cost," &c.

Whereupon the Court held that Pitman was only entitled to interest from the date of the judgment, and which amount had been paid and the judgment satisfied, and counsel for Pitman excepted.

The Court further held, that if interest was not to be calculated upon said verdict, from its date, it was void for uncertainty, as no time was designated by said verdict, from which interest was to be computed. To which ruling counsel for Pitman excepted.

Pitman then offered to prove by witnesses, what was proven on the trial of the case, relative to the set-off pleaded by Marshall. The Court rejected the testimony and discharged the rule, and counsel for Pitman excepted, and thereupon tendered his bill of exceptions, assigning as errors the ruling and decisions above excepted to.

SAML. HALL, for plaintiff in error.

G. R. HUNTER. *contra*.

By the Court—LUMPKIN J., delivering the opinion.

This was not a motion to enter a *nunc pro tunc* judgment, but to amend the judgment by inserting interest, or rather the time from which interest should be computed. And this could only be done by explaining, by parol testimony, how the jury ascertained the amount of principal which they found to be due, and thereby fix the time when it became due.

We think the Court was right in rejecting this proof.

It is going very far, to allow a verdict to be amended by the declaration; and the judgment by both writ and verdict.

Watkins vs. Jenks and Ogden.

Beyond this, the Courts should refuse to go, particularly after the judgment has been satisfied and much time has elapsed.

Judgment affirmed.

ANSEL L. WATKINS, plaintiff in error, vs. JENKS and OGDEN, defendants in error.

S., a debtor, in failing circumstances, was indebted to W. \$1,350; and to secure the payment "sold, transferred and assigned" notes and accounts amounting to \$2,800. The original indebtedness from S. to W. was not extinguished by this assignment.

Held, that the transaction being neither a sale nor a mortgage, but a partial assignment, was obnoxious to the prohibition in the Act of 1818, and void.

GARNISHMENT; from Macon county. Decision by Judge POWERS, September, 1857.

Ogden and Jenks, having obtained judgment and sued out a *fi. fa.* against F. T. Snead, had summons of garnishment served on E. W. Allen, Esq., and Ansel L. Watkins. Summons of garnishment in other cases were sued out and served upon the same parties.

Watkins appeared and answered that Snead was indebted to him \$1,350, besides interest, for rent, and to secure said debt he sold, transferred and assigned to respondent a number of notes and accounts amounting to about \$2,800, as per schedule annexed to said assignment. That he, Watkins, placed the said notes and accounts in the hands of E. W. Allen, his attorney, for collection; that his attorney has paid to him, as collected, the sum of forty dollars, and the remaining notes and accounts are in the hands of his attorney, uncollected: besides this, that he had nothing in his hands, for

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had, at the time of the service of the summons, anything belonging to Snead, nor is nor was indebted to him anything.

The deed of assignment from Snead to Watkins is as follows :

GEORGIA, } This indenture, made and
Macon county. } entered, this 12th day of Feb-
ruary, 1856, between Fletcher T. Snead, of the county of Ma-
con, and Ansel L. Watkins, of the county of Bibb, witnesseth
that, whereas, the said Fletcher T. Snead is justly indebted
to the said Ansel L. Watkins in the sum of \$1,350, by five
promissory notes; one for \$500, dated 1st Feb., 1852, at nine
months; one for \$400, dated 1st Oct., 1852, and due 12
months after date; one for \$300, dated 1st Oct., 1853, at 12
months; one for \$100, dated 1st Oct., 1854, at 12 months;
one for \$50, dated 1st Oct., 1855, at 12 months; all for rent
of store.

Now to secure said Ansel L. Watkins harmless from all loss or damage, by reason of said notes and such interest as may accrue thereon, I bargain, sell, assign and convey to the said Ansel L. Watkins, his heirs and assigns, all the notes and accounts as per schedule, and hereto attached, solvent and insolvent, and hereby clothe him with full power to collect the same by suit or otherwise. And should there be enough, with reasonable diligence, to pay off and discharge said notes, that then the same be paid and cancelled. And should there be more than sufficient, that then and in such case, the said overplus be deposited in the Clerk's office of Macon Superior Court, or in the hands of the Sheriff of Macon county, as may be directed by the presiding Judge of the Macon Circuit, to be disposed of to the lien or liens that may, by priority, in the judgment of said Court, be entitled to receive the same against the said Snead.

I hereby surrender possession of said notes and accounts to said Watkins, and authorize him to collect the same in the most expeditious manner.

In witness whereof, I have hereunto set my hand and affixed my seal.

F. T. SNEAD, [L. s.]

Signed, sealed and delivered in presence of

R. J. PEACOCK,

E. W. ALLEN, J. I. C. . .

Counsel for Watkins offered to prove that all the notes and accounts assigned were not worth the sum of \$1,350, and that that sum could not have been collected out of them by reasonable diligence. The Court stated that it would consider that proof as made.

It was admitted that Snead was a relation, by marriage, to Watkins—having married his aunt. It was further admitted that Snead was insolvent at the time the assignment was made, 12th Feb., 1856, and that plaintiff's *fi. fa.* was then issued, and that four other *fi. fas.*, in favor of other creditors, were issued, and other suits were pending against Snead.

The Court held the deed of assignment void, and that plaintiffs in the *fi. fas.* were entitled to the assets and proceeds thereof, mentioned and described therein.

To which ruling and decision counsel for Watkins excepted.

STUBBS & HILL; and E. W. ALLEN, for plaintiff in error.

COOK & MONTFORT; and MILLER & HALL, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

In *Norton vs. Cobb & Crawford*, (20 Ga. Rep. 44,) this Court held, that a transfer of a stock of goods, by a debtor, in failing circumstances, to B., a creditor, with power to sell the same at public auction, and after applying the proceeds to the extinguishment of A's debt, the balance to be turned over to C, to be used and appropriated to the satisfaction of his

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demand, and the residue to D, for a like purpose, was void; as falling within the prohibition of the statute of 1818, against partial assignments.

Our judgment is, that the transfer in this case is covered by that decision. It is neither a sale nor a mortgage, but a partial assignment by a debtor in failing circumstances, and in violation of the Act of 1818.

Judgment affirmed.

JAMES HOLLINGSWORTH, plaintiff in error, vs. **WALLACE W. DICKEY**, defendant in error.

A judgment obtained in this State prior to December, 1822, need not be renewed. Where a Justices' Court execution, issued in Twiggs county, and was levied on land in Early county, and there was an entry by a constable, of "no personal property to be found," before the *fi. fa.* was backed by the Justice of the Peace in Early county, and the levy in Early was made by a different constable from the one who made the first return, it will be presumed that the first entry was by a constable of Twiggs county, where the defendant resided, and where the judgment was obtained.

A transfer of a *fi. fa.* prior to the Act of 1829, is no satisfaction of the debt.

EJECTMENT: from Calhoun county. Tried before Judge **ALLEN**. November Term, 1857.

This was an action of ejectment brought by Doe on the several demises of John Hollingsworth and James Hollingsworth, executors of Thomas Hollingsworth, deceased, against Roe, *cas. ejector*, and Wallace W. Dickey, tenant in possession, to recover lot of land No. 158, in the 4th district of Calhoun county.

On the trial, plaintiff introduced a grant from the State to John Hollingsworth, dated in Nov. 1821; then a deed from

John Hollingsworth to Thomas Hollingsworth, the testator, for the premises, dated in November, 1822; then the letters testamentary, from the Court of Ordinary of Gwinnett county, to James Hollingsworth, as executor of Thomas Hollingsworth, deceased. He then proved Dickey in possession at the commencement of the suit, and closed.

Defendant then went into his defence, and offered in evidence a deed by the Sheriff of Early county, to James Ward, for the premises in dispute, dated 7th August, 1838, and recorded in Early county, 15th August, 1838, and sold by said Sheriff as the property of John Hollingsworth, under a Justice Court *fi. fa.* against him from the county of Twiggs in favor of James Hollingsworth. Also the said *fi. fa.* dated 13th July, 1822, for twenty-five dollars and fourteen cents, with the following endorsements and entries thereon :

"I transfer the within execution to George Johnson, for collection. March 21, 1827.

[Signed,] JAMES HOLLINGSWORTH."

"GEORGIA, } To any lawful officer to execute
Early county. } and return. June 14, 1838.

T. B. HARWELL, J. P."

"No personal property to be found to levy this *fi. fa.* May 6th, 1837.

[Signed,] JAMES ANDEES, L. C."

"This is to certify that I have this day levied the within *fi. fa.* on lot of land No. 158, in the 4th district of Early county. This 7th June, 1838.

[Signed,] JESSE STRICKLAND, Const."

"The above land sold for ten dollars and paid over on said *fi. fa.* 7th August, 1838.

JOHN A. WOOD,
Sheriff of Early county."

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To the introduction of all which testimony, plaintiff objected. 1st. Because said judgment and *fi. fa.* at the time of sale, were dormant. 2d. Because before the *fi. fa.* could be levied on real estate, there should have been a return of no personal property on which to levy, made by the levying officer of Early county. 3d. That there should have been a return of no personal property in Twiggs county, where the judgment was obtained, or in same county of defendant's residence. 4th. That the *fi. fa.* having been transferred before the Act of 1829, the same was satisfied by the transfer.

The Court overruled the objection and admitted the evidence, and plaintiff excepted.

The jury found for the defendant, and plaintiff's counsel tendered his bill of exceptions.

VASON & DAVIS, for plaintiff in error.

PERKINS, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

It is conceded that the defendant in ejectment is entitled to hold the land sued for, provided the Sheriff's sale is valid, through which his title is derived. The land was sold under a Justices Court *fi. fa.*, to which three objections are made. 1st. That the judgment upon which it issued, is dormant. 2d. That there should have been a return of no personal property, by a Constable of Twiggs county, where the judgment was obtained, as well as by a Constable of Early county, where the land was situated and sold: and 3d. That the execution being transferred before the Act of 1829, was void.

[1.] The judgment upon which the execution was issued, bears date, 20th of February, 1819; and the execution was issued the 13th of July, 1822. Of course the judgment in this case does not come under the dormant judgment Act of 1823. Being rendered prior to December, 1822, it is expressly excluded by the Act of 1823.

It is insisted therefore, that it is to be regulated by the common law, and must have been renewed after a year and a day. Without stopping to inquire whether it was dormant at common law; or the effect of the judiciary Act of 1799, or the statute of 1811; the Act of 1812 declares in so many words, that "no part of the judiciary laws of this State shall be so construed as to require the renewal of any judgment, as heretofore practiced; or in any other manner whatsoever." (Cobb, 496.) This objection then is clearly untenable, being in the very teeth of the law.

[2.] Before the *fi. fa.* was backed by the Justice of the Peace of Early county, there is a return by a Constable of no personal property to be found whereon to levy the *fi. fa.* And this entry is made by a different Constable from the one that levied the execution on the land in Early. Under this state of facts, the presumption is, that the law was complied with; and that the return was made by a Constable of Twiggs county, where the judgment was obtained, and where the defendant resided.

For myself, at least, I would not have it understood, or inferred, that even this is necessary, so far as the title of an innocent purchaser is concerned. The authority of the Constable to levy on land, is derived from the fact that there is no personal property out of which the execution can be collected. And if such be the fact, while his entry is a convenient mode of establishing it, I am not prepared to say, that I would not allow an innocent purchaser to protect his title by showing that such was true. And then on the other hand, with my present opinions, I would look to such entry as a protection to his title, no matter by what Constable made, nor when made. The act itself has been, in my humble belief, misconstrued from the beginning. It was passed for the benefit alone of the defendant in *fi. fa.*; to give him the right to compel the satisfaction of his debts, out of his perishable property, leaving him in the enjoyment of his homestead. Still, allowing him the privilege of pointing out his land, if

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such was his choice. If he saw fit not to interfere by illegality, but to stand by and see his land sold, the title of the *bona fide* purchaser should never have been disturbed. But these points are not in the case, and I am determined to adhere to existing decisions.

As to the transfer of the execution being a satisfaction of the debt, such was not the doctrine, even of the common law. In England, the assignee took an equitable interest, which could be enforced. Some Judge so decided, perhaps; and hence the passage of the Act of 1829. An Act, like hundreds of others in our State, passed, not to declare what the law *shall be*, but what it is, and always has been.

Judgment affirmed.

JOHN P. GAULDEN, plaintiff in error, vs. HENRY D. SHEHEE,
defendant in error.

- [1.] Where the plaintiff holds several notes of the defendant due at different dates and upon which separate suits are brought at the respective maturity of each, the Court will not compel a consolidation of the actions; especially when the motion to do so, is made after one of the cases has been continued for the Term.
- [2.] Where two suits are pending between the same parties, upon separate notes, which are parts of the same contract, and the defence to each, is precisely the same, interrogatories taken in one of the cases, may be read in both.
- [3.] Upon a question of fraud in the sale of land, the testimony should be restricted to its value at the time of sale, and not its present worth, in order to fix the damages.

Assumpsit, from Decatur. Tried before Judge ALLEN,
October Term, 1857.

This was an action of assumpsit, by Henry D. Shehee

against John P. Gaulden, on a promissory note, made by Gaulden for \$2,500.

To this action, defendant plead :

1st. The general issue.

2d. Partial failure of consideration, in this, that said note was given as a part of the purchase money, of several lots of land in Decatur county, bought by defendant from plaintiff, consisting of about thirteen hundred and sixty-seven acres. The entire purchase money being \$7,500. That at and before the purchase, plaintiff represented to defendant that said body of land contained five hundred acres of river bottom, which was then covered with water ; that this representation was untrue, and known to be so by plaintiff at the time he made it. But that defendant relying upon said representations, believing them at the time, and not being able to measure the land on account of the water on it, confirmed the purchase, and gave his notes, one of which is that sued upon ; that the river bottom land does not exceed three hundred acres, and that the difference in value between the bottom land and that not bottom land is ten dollars per acre, and that the quantity of land represented as bottom land was the inducement to defendant to make the contract.

It was further alleged, that plaintiff since said purchase, has removed and now resides out of the State.

At October Term, 1857, the case was called for trial on the appeal, and defendant moved to consolidate this action with another, brought on one of the other notes given in part of said purchase money, in the same Court, by the same plaintiff against the same defendant, and resting upon the same or part of the same consideration.

The Court refused the motion to consolidate, and defendant excepted.

Defendant had sued out separate commissions to take the depositions of Joseph P. Gray, in the cases pending in Court;

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this case being one, and the other being on another note, given as part of the purchase money of the same land, by the same plaintiff against the same defendant, and he moved to be allowed to read and use both sets of interrogatories and answers in this case.

Plaintiff objected. The Court sustained the objection and defendant excepted.

Defendant then moved to continue the case, on the grounds:

1st. That the ruling out one set of the depositions of Gray, was a surprise, as he had expected to use both on this trial, and without said depositions, he could not safely go to trial.

2d. That Judge ALLEN, (the presiding Judge,) was a material witness for him, and he having declined to be examined in this or any case, *ore tenus*, he could not go to trial without his testimony, which he expected to obtain by commission, by the next Term of this Court.

The Court overruled the motion to continue, and defendant excepted.

Plaintiff then offered and read in evidence the note, and closed.

Defendant then went into his defence, and introduced testimony in support of his pleas. Plaintiff replied:

The Court charged the jury, amongst other things, that if it was proven that the note sued on was given as part of the consideration for the purchase of a plantation bought by defendant from plaintiff, consisting in part of bottom land, and that at the time, the parties were in treaty in relation to said purchase, a portion or all of the bottom land was covered with water so that defendant could not ascertain the quality or quantity, and plaintiff represented to defendant that there were four hundred or any other number of acres of bottom land, and that it was of a particular quality or value, and these representations were untrue, and defendant was damaged thereby, the jury should de-

duct from the note the amount of such damage, and plaintiff was bound by his representations whether he knew them to be false or not.

The jury found for the plaintiff the full amount of the note, with interest and cost.

Whereupon counsel for defendant moved for a new trial.

1st. Because the verdict was contrary to law, the evidence and the charge of the Court.

2d. Because the Court permitted the witness English, against the objection of defendant, to testify as to the present value of the lands.

3d. Because the Court erred in refusing to consolidate; in refusing to allow defendant to read both sets of depositions of the witness Gray, and in refusing the motion for continuance, as before set out and excepted to.

The Court after argument, refused the motion for a new trial, and defendant excepted.

I. E. BOWER, for plaintiff in error.

McINTYRE & YOUNG; and COLE, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Was the Court right in refusing to compel the plaintiff to consolidate the two actions? We think so, clearly. The notes fell due at different times, and were sued each, at maturity. (*Tidd's Pr.* 613.) Besides, in this case, one of the cases had been continued for the Term, before the motion to consolidate was made.

[2.] Did the Court err in refusing to allow the testimony of Gray, taken by commission, to be read? There were two cases pending in the Court upon two separate notes, but both notes were part of the same contract. Two sets of interrogatories were taken out for the witness Gray, one in-

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tended for the one case and the other for the other. One set was answered more fully than the other, and on that account, the defendant proposed to read both sets, in the same case. Why not allow it to be done? The parties were the same; the subject matter or issues the same precisely in both cases. No good reason can be assigned why they should not have been read.

[3.] The witness, English, was permitted by the Court to be examined as to the present value of the land, in order to ascertain whether Gaulden was injured by the fraud alleged to have been practiced upon him when he bought the land. This was clearly wrong. His testimony should have been restricted to the value of the land at the time of the purchase, and not extended to its present value.

Considering the loss and depreciation in the quantity and quality of the land, it is impossible to justify the verdict upon any other hypothesis, than that the jury took into consideration the present value of the land, and that, they had no right to do under the law.

We forbear to express any other or further opinion upon the facts.

We have omitted noticing several points which will not arise upon another trial, and which involve no legal principle of general importance.

Judgment reversed.

SAMUEL SMITH, plaintiff in error, vs. MERRICK BARNES, defendant in error.

An order drawn by A. on B. in favor of C., to pay the latter \$88 37-100 in full, is not such an instrument as requires demand and notice, in order to bind the drawer.

Assumpsit, from Dougherty county. Decision by Judge ALLEN, at November Term, 1857.

This was an action by Samuel Smith against Merrick Barnes, upon the following written instrument, to-wit :

ALBANY, January 4, 1855.

Mr. George F. Drew :

Sir: Please let Samuel Smith have eighty-eight and thirty-seven-one hundred dollars worth of lumber at your mill when called on, at one dollar per hundred feet for square lumber, which I have this day credited on your note that I hold for two hundred dollars, payable in lumber at your mill, when called for, at one dollar per hundred feet, and dated, Dec. 25th, 1854.

And oblige,

MERRICK BARNES.

Attest : A. Y. HAMPTON.

The declaration contained three counts: The first was a special count on the instrument averring presentment, refusal to pay or accept, and notice to the drawer. The second; a count that defendant was indebted to plaintiff eighty-eight hundred and thirty-seven feet of lumber, at one dollar per hundred feet, and in consideration thereof, undertook and promised to pay said lumber at the rate specified, as its value. Third, was a count for money paid, and had and received.

Upon the trial, plaintiff offered in evidence the order above stated, which was received.

He then offered and read the answers of *George F. Drew*, to interrogatories, who testified : That he knew the parties, that no order was ever presented to him by plaintiff, but plaintiff informed him that he had such an order, and he told plaintiff if he would make out the bill, he witness, would saw it for him, which plaintiff said he would do; but before it was done, witness discontinued his mill : That he was noti-

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fied of the order in Albany, at plaintiff's store, in January, 1855, and agreed to pay the order. It was about fifteen or twenty days after he was notified of the order, that he discontinued sawing. At the time he was notified of the order, he could have filled it. Cannot say how long after the date of the order, that he received notice; he agreed to saw the lumber, and plaintiff agreed to wait until it was done. The order was never presented, except as before stated; he did not refuse to accept it, but agreed to saw the lumber, and plaintiff agreed to take it.

Plaintiff then closed, and defendant moved for a nonsuit, upon the ground that the paper declared on and offered in evidence, was a bill of exchange, and the drawer thereof was entitled to notice of non-acceptance or non-payment.

The Court granted the motion and nonsuited plaintiff; and plaintiff's counsel excepted.

CONNELLY, for plaintiff in error.

VASON & DAVIS, for defendant in error.

By the Court.—LUMPKIN J. delivering the opinion.

It seems that Barnes, the defendant below, as well as in error, held the note of one George F. Drew, for two hundred dollars, payable in lumber at Drew's mill, when called for, at one dollar per hundred feet. Barnes gave to Samuel Smith the plaintiff, an order on Drew, for \$88 37-100 worth of lumber, to be delivered when called for, upon the same terms, and entered a credit upon Drew's note to him for that amount. The order was dated the 25th of December, 1854. Smith met Drew in Albany, a few days afterwards, and informed him that he had the order, when Drew told him to make out a bill of lumber and he would saw it for him. Smith promised to do so, but Drew discontinued his mill some fifteen or twenty days thereafter.

Was Smith bound to give notice to Barnes? . . .

To support the affirmative of this proposition, two things are necessary. 1st. That the instrument of writing given by Barnes to Smith is a bill of exchange; and 2dly. That being a bill of exchange, it is not included in the Act of 1826. (*Cobb* 594.) This act dispenses with notice, to parties secondarily liable, in all other than bankable paper.

We hold that Mr. Barnes has failed to make good the first ground, namely, that this instrument is a bill of exchange. It is investing such a neighborhood transaction as this, with too much dignity to call and consider it as such. And as to the second point, this Court has gone so far as to hold, that the act did apply to endorsers on foreign bills of exchange. (4 *Ga. Rep.* 106.) Whether it extends to parties, who occupy the relation of drawer and payee, has not I believe, been decided. We do not wish to be considered as expressing any opinion upon the second point.

Judgment reversed.

FRANKLIN O. WELCH, plaintiff in error, vs. JOSEPH BUTLER, et al. defendants in error.

- [1.] A sale made under a dormant judgment is void.
- [2.] It is not sufficient to reverse the judgment of the Court, unless required positively by statute, because the Court has committed an immaterial error in its charge, but the finding of the jury is satisfactory.
- [3.] It is no error for the Court to refuse to give charges to the jury as requested in writing, if they are inapplicable to the case.
- [4.] A *bona fide* purchaser can acquire no valid title under a void judgment; otherwise, when the judgment is voidable only.
- [5.] The entry of an officer cannot revive a void judgment. It can be revived through a Court only upon notice to the opposite party, and then takes effect from the date of the last judgment.
- [6.] The date of an officer's return may be enquired into.

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EJECTMENT, from Baker. Tried before Judge ALLEN. November Term, 1857.

This was an action of ejectment by John Doe, on the several demises of Joseph Butler, and Augustus S. Jones, against Richard Roe, *casual ejector*, and Franklin O. Welch, tenant in possession, for the recovery of lot of land, No. 157, in the 9th district of Baker county.

The case, by consent, was transferred to the appeal. On the trial the plaintiff offered and read in evidence, the grant from the State of Georgia to Joseph Butler, for the lot of land in controversy, dated 27th January, 1836; then a deed from Butler to Augustus S. Jones, for same lot, dated 7th January, 1837, recorded 27th February, 1854; proved the *locus*, and possession of defendant, and closed.

The defendant introduced,

1st. A deed for the lot in dispute, from George W. Callier, Sheriff of Baker county, to William B. Crawford, dated 6th July, 1852; sale made by virtue of a *fi. fa.* levied on lot of land No. 157, 9th district, Baker county, by A. P. Greer, Constable. Recorded 13th July, 1852.

2d. A deed from Crawford to William E. Smith, dated 23d Dec., 1852, for the same lot: not recorded.

3d. A deed from Smith to Welch, Sherman & Co.: not recorded.

4th. A deed from Welch, Sherman & Co., to defendant, Franklin O. Welch, dated 22d December, 1854: not recorded.

In support of the Sheriff's deed, the defendant introduced three *fi. fas.* issued from a Justice's Court of Pulaski county, all in favor of A. Manning vs. Joseph Butler, and dated 3d March, 1842.. The first *fi. fa.* was for eleven dollars and seventy-two cents, and upon which were the following entries: "No personal property to be found whereon to levy this *fi. fa.* March 3d, 1842; cost, 31 1-4. D. T. Cross,

Const." "Levied the within *fi. fa.* on one gray mare, 23d July, 1842. D. T. Cross, Const." "The above levy sold for \$16.50, of which \$13.25 was applied to costs on this and other *fi. fas.* against said Butler, 20th August, 1842. D. T. Cross, Const." "Received on the within *fi. fa.*, three dollars and twenty-five cents, 20th August, 1842. "Georgia, Dooly county. No property to be found by me whereon to levy this *fi. fa.* This 1st April, 1848. Matthew F. Floyd, Const." "Georgia, Baker county. To any lawful officer to execute and return: You are hereby authorized to execute and return within *fi. fa.* May 19th, 1852. Thomas Lyan, J. P." "Recorded." "I transfer the within *fi. fa.* to C. Torrance, to have full control, as myself, Oct. 20th, 1849, without any recourse on me hereafter. A. Manning." "Cost paid by defendant." "Georgia, Baker county. Levied this *fi. fa.* on lot of land 157, 9th district of said county, as the property of Joseph Butler, pointed out by Jacob Watson. May 19th, 1852. A. P. Greer, Const." "The above levy sold this day for one hundred and thirteen dollars, and after deducting cost, money applied to this and other *fi. fas.* August 6th, 1852. George W. Callier, Shff."

"Received twenty-one dollars and sixteen cents in full, on this *fi. fa.*, and the balance of the money applied to two other *fi. fas.* of same date, and in favor of same plaintiff. August 6th, 1852. J. R. Watson."

On the second *fi. fa.* was an entry of no personal property, made by Cross, the Constable, 30th March, 1842. No property by Floyd, the Constable in Dooly county, dated 1st April, 1848; a transfer by Manning to Torrance, Oct. 20th, 1849, and a receipt in full by Watson, from sale of No. 157, 9th, Baker, dated 6th August, 1852. This *fi. fa.* was for \$17.25, with interest from 24th March, 1841.

On the third *fi. fa.* there was the same entries as on the second. This *fi. fa.* was for \$25.00, with interest from 1st January, 1841.

Defendant examined Cross, the Constable from Pulaski,

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who had made the entries, who proved that he knew Butler. That he was Constable in Pulaski county, in 1842—had the *fi. fas.* (above mentioned) in his hands for collection. Knew Butler in 1842; knew him before; don't know where Butler lived when the land was drawn; thinks he resided in Pulaski county in Dec., 1841; don't know how long he lived in Pulaski; he was considered broke in July, 1842; don't know his condition in 1848, nor in 1852; last time he saw him, in 1853 or 1854, his condition was very bad; cannot say he drew a lot of land. The entries on the *fi. fas.* were made by him (witness) in 1842; sold the grey mare in July, 1842, for \$16.50. Thirteen dollars and twenty-five cents were applied to the cost on the *fi. fas.*, and three dollars and twenty-five cents on one of the *fi. fas.* They were in my (witness) hands when the levy was made, and were advertised as levied. They were never paid off while in his hands; the cost on them was paid, and \$3.25 principal, on one of them.

Cross Examined.—He made all the entries over his name; the entries were in his hand writing; cannot say the entry as to the sale of the grey mare, was made on the day or not, but if not on the day, pretty soon afterwards; it has been sixteen or seventeen years since he first knew Butler; knew him first in Dooly county, he lived a portion of the time in Pulaski; when he left that county, cannot say where he went; thinks he went to Dooly, and then to Florida; don't know his age; supposes he is now about sixty; don't know where he now resides, but he told witness some three or four years ago, that he lived in Florida.

It was agreed and admitted, that at the date of the levy on the land, there was no personal property of defendant in *fi. fa.* (Butler) in Baker county, and that said entry of no personal property be now made *nunc pro tunc*.

Defendant then closed.

Plaintiff proposed to prove by a witness, that the entry made by Floyd, Constable, on the *fi. fa.* dated 1st April, 1848,

was not made at that time, but in 1852. Defendant objected to this testimony; the Court overruled the objection, and the witness (Jacob Watson) testified that said entry by Floyd, dated 1st April, 1848, was not made at that time, but sometime in 1852; that witness carried the *fi. fa.* to Floyd and procured him to make said entry and antedate the same; that Floyd was acting as Constable in Dooly county at the time said levy was antedated, and at the time it purports to have been made; that he (witness) wrote the entry himself, and Floyd signed it, as Constable, believing at the time it was legal so to do, and that such entry would keep the *fi. fa.* in life.

The testimony being closed, defendant's counsel requested the Court to charge the jury,

1st. That when one of two innocent persons must suffer, the one most culpable ought to sustain the loss.

2d. That Jones, by his laches in not recording his deed from Butler, has produced all this litigation. That if his deed had been recorded in time, the purchaser at Sheriff sale, as a reasonable and prudent man, would not have bought.

3d. That the law does not encourage laches in any person, but assists and sustains the vigilant and diligent.

4th. That Crawford finding no deed upon record from Butler, and a *fi. fa. prima facie* in force against him, was authorized to bid and purchase the lands, and his title thus acquired is good against Butler and all others.

5th. That the entry made by Constable Floyd in 1848, although antedated, cannot affect Crawford and his assigns, they being innocent purchasers without notice; and plaintiff's remedy is against the officer for a false return.

6th. That a *bona fide* purchaser at Sheriff's sale under and by virtue of an apparently valid and subsisting judgment and *fi. fa.*, acquires a good title, or all the title the defendant had in the property sold.

7th. That agreeably to the admission and agreement of counsel; the jury are to consider the *fi. fa.* as a good and subsisting execution at the time of sale, and that all the requis-

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tions of the law have been complied with in respect thereto.

8th. That the entry of Floyd was not a forgery, but if anything, was a fraud, and for which his sureties are liable to the party injured thereby; but his acts under and by virtue of the *fi. fa.* are valid and binding as in favor of an innocent purchaser without notice.

9th. That the entry of an officer on an execution, of "*no personal property*", can be made at any time, *nunc pro tunc*, and when made relates back to and is considered as having been made at the time it was his duty to have made the same.

10th. An entry by a Constable of "no personal property to be found", on a *fi. fa.*, as between the original parties, is *prima facie*, and when the rights of third parties intervene, it then becomes conclusive, unless it is shown that such third party had notice of fraud.

All of which the Court refused to charge, as not applicable to the case, but charged the jury that if they believed that the judgment upon which the *fi. fa.* is founded was dormant, the sale was void, and the purchaser at Sheriff's sale got no title, and they must find for the plaintiff. That in computing the time on the *fi. fa.*, they must calculate from the date of the judgment or last entry on the *fi. fa.*

The jury returned a verdict for plaintiff, and defendant moved for a new trial, on the grounds of error in the charge, and the refusal to charge, in the admission of Watson's testimony; because of newly discovered testimony since the trial; and because the verdict is against the law and evidence.

The Court overruled the motion for a new trial, and defendant excepted.

W. E. SMITH; P. J. STROZIER; WARREN & WARREN, for plaintiff in error.

LYON, IRWIN & BUTLER, *contra*.

By the Court.—McDONALD J., delivering the opinion.

[1.] The charge of the Court to the jury, that if they believed, that if the judgment upon which the *fi. fa.* was issued, was dormant, the sale was void, and the purchaser at Sheriff's sale got no title, and they must find for the plaintiff, was correct. The statute declares that such judgment shall be void and of no effect. (*Cobb*, 498.)

[2.] If the Court was incorrect in instructing the jury, that in computing the time on the *fi. fa.*, they must calculate from the date of the judgment, or the last entry on the *fi. fa.*, we will not, for that cause, reverse the judgment, if the verdict be right.

There was an entry, legally made on the *fi. fa.*, and the alternative feature in the charge was neither intended nor calculated to draw the mind of the jury from the point in the case, that if a lawful entry had been made on the execution every seven years, it was good and valid. The verdict of the jury is satisfactory.

[3.] The refusal of the Court to give in charge to the jury, the requests of the counsel of plaintiff in error, submitted in writing to the Court, is made a ground for asking for a new trial. The Court refused to give them in charge because they were inapplicable to the case. And so we think.

The land was sold by the Sheriff as the property of the drawer. Augustus S. Jones purchased from him, and his deed bears date on the 7th January, 1837. It was recorded 27th Feb., 1854. There was no question in this case under the registry acts, as to the validity of the title of the purchaser at Sheriff's sale against Jones' title. It was quite a different question. It was in regard to the lien of the judgment and validity of the execution under which the land was purchased. The five first requests of counsel for plaintiff in error, in the long string of requests submitted by them, had no application, therefore, to the case, as presented to the jury.

[4.] The statute declares a dormant judgment to be void

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and of no effect. It, therefore, requiring no act of the party to avoid it, falls not within the class of voidable judgments. All acts done *bona fide* under a *voidable* judgment are good, until it is set aside. But no act is good under a *void* judgment, and even a *bona fide* purchaser can acquire no title under it. *Woodcock vs. Bennett*, 1 *Cowen's R.* 734.

A judgment which loses its lien merely because it is not revived under the old law, was not a void judgment, and rights acquired by strangers under such judgments might have been ordinarily protected, but as our statute declares dormant judgments *void and of no effect*, the rule is different. The fifth and sixth requests ought not therefore to have been given in charge to the jury.

There was no consent of counsel that the *fi. fa.* was a good and subsisting execution at the time of the sale; and the 7th request ought not to have been given in charge.

[5.] At the time the entry was made on the execution by the Constable Floyd, the execution was void and of no effect. His entry could not revive it. It required the action of a Court, upon notice to the opposite party, to obtain another judgment thereon, which takes effect from its date. He acted without authority in more respects than one, which will be adverted to again presently. There was no error, therefore, in refusing to give the 8th request in charge to the jury.

If the 9th request was asked in reference to the entry made by Floyd on the execution, it was illegal, and ought not to have been given. If it relates to the facts agreed upon by counsel, it was still illegal, as a Constable of Baker county, where there was no proof the defendant ever resided, was not the *proper* officer to make such return. The case of *Duncan vs. Webb & Foster*, 7 *Ga.* 187, requires, in my opinion, some qualification.

We see nothing in the facts of this case, under the view we have taken of it in what we have said, which warrants the 10th request, and therefore say it ought not to have been charged.

[6.] The evidence of Jacob Watson had reference to the date of the entry and was not introduced to controvert any fact stated in it. Without going further into the consideration of the question whether the return of the Constable was traversable, it is sufficient to say that there is no legal objection to proof that it bears a wrong date.

In regard to the other points made in the motion for a new trial, it is perhaps sufficient to say, that we are satisfied that the verdict of the jury is supported by the law and evidence of the case, and we will not therefore interfere with the decision of the Court below on these grounds in the motion. We will barely remark (inasmuch as it was argued with much earnestness, that, as the purchaser at Sheriff's sale was a *bona fide* purchaser, and should be protected, although we have determined that his purchase cannot be sustained under the law) that it seems to us, that he was not as vigilant as he might have been, and that without referring to the obvious grounds on which we have placed the decision, his title could not be sustained on other grounds connected with Floyd's entry on the execution. The judgment was obtained in Pulaski county. The execution was issued from the Justice's Court in which the judgment was obtained. Floyd was a Constable of Dooly county, and his entry appears, from the execution, to have been made in that county. The execution had not been backed by a Justice of the Peace of Dooly county. Floyd had no authority therefore, to search for and levy on property of the defendant in that county, and of consequence had none to make the entry of "no property." The purchaser could have known this by examining the execution. Again, it no where appears that Butler resided in Dooly county at the time that entry purports to bear date. If he did not, the entry is a nullity, in my judgment.

Judgment affirmed.

Corbett vs. Gilbert.

E. C. CORBETT, plaintiff in error, vs. JOHN GILBERT, defendant in error.

- [1.] The verdict of a jury may be amended in form, to correspond with the manifest intent of the jury apparent in the verdict.
- [2.] An attorney at law who is called on to write a bill of sale for a negro, is not prohibited by the statute from giving evidence of a conversation between the parties in relation to the contract.
- [3.] Request to charge, not warranted by the evidence in the cause, ought not to be given.
- [4.] A party making a positive assertion of the solvency of the maker of a note, in order to enable him to pass it off in a trade, when from circumstances he is presumed to know his condition, and he knows that the party with whom he is trading supposes him to be acquainted with it, is liable, if the maker be insolvent at the time.
- [5.] Declarations that a person is solvent, have reference to the time when the declaration is made.
- [6.] Request to charge not warranted by the evidence, need not be given.
- [7.] If plaintiff declare in deceit against a defendant for the fraudulent representation that the maker of a note, which he proposed to trade to him, was solvent, when he knew at the time he was insolvent, he must sustain both allegations by direct proof, or by circumstances, to the satisfaction of the jury.
- [8.] The return of *nulla bona* on an execution against a debtor, is not the highest evidence of his insolvency. His discharge under the insolvent debtor's act is higher and better evidence of that fact.

Case, from Early Superior Court. Tried before Judge ALLEN, at September Term, 1857.

Edmund C. Corbett, in the year 1852, purchased from John Gilbert a negro man slave, and in part payment transferred to him a promissory note for \$600, which he held on one Allen J. Harrison, dated the 17th day of July, 1852, and due twelve months after date, for value received. At the September Term, 1853, after the note fell due, Gilbert commenced an action on the note against Harrison, and at the April Term following, obtained a judgment against him. On the 1st of May following, a *fi. fa.* upon that judgment was issued and placed in the hands of the Sheriff, who, on the 20th day of June, 1854, made a return of *nulla bona*, John Gilbert, thereupon brought this action on the case against Edmund

C. Corbett, stating in his petition the above facts, and alleging that he was induced, by the representations made him by Corbett, as to Harrison's solvency, to take the promissory note, and that Corbett, well knowing that Harrison was in insolvent circumstances, fraudulently, and intending to deceive him, made such representations.

On the case coming on to be heard at September Term, 1857, the defendant demurred to the plaintiff's declaration, on the grounds that it neither set out the action of deceit or guarantee, and because of the misjoinder of case and assumpsit in the same count, which the Court overruled, and to this the defendant excepted.

Plaintiff, upon the trial, introduced as a witness, Samuel S. Stafford, who testified as follows: "Plaintiff and defendant came to his office and asked witness to write a bill of sale for the negro. Defendant said that he had left one of the notes at home he intended to let plaintiff have in payment for the negro; went home and got it; when he handed the notes to plaintiff, plaintiff said he did not know the makers and was taking them upon the representations of defendant, that they were solvent; defendant observed that they were solvent, and that Stafford (witness) could collect the money out of them for him. Did not hear the trade between them. Witness sued the note as soon as it became due and never collected any money on it. Thinks Harrison, the maker of the note, left the county in the latter part of the year 1854, or first of 1855, and thinks that he carried off the negro that the note was given for, but did not know that he carried off any other property. Witness told plaintiff that if the note had been due at the time it was traded, he thought it probable he could have collected it. Don't think he should have known anything of the matter but from the parties having applied to him as an attorney, to write the bill of sale. That the land owned by Harrison at the time of the trade, was afterwards, in November, 1853, sold under fi. fa.; witness did not consider

the woman sold by Corbett to Harrison worth more than \$200."

The defendant's counsel objected to this testimony on the ground that all of Stafford's information was obtained by reason of, and during the relationship of client and attorney. The Court overruled the objection and the defendant excepted.

The counsel for the defendant asked the Court in writing to charge as follows:

1st. That the transfer of a promissory note releases the transferrer of any responsibility to any party or subsequent holder.

2d. That a suit on a promise to guarantee must be brought upon the special contract, and is not sustained by proof of misrepresentations.

3d. A guarantee is a promise to pay the note transferred, if the maker does not pay it.

4th. That a representation to be actionable, must not only be false, but be so to the knowledge of the party making it.

5th. A representation that a party is good or solvent, has reference to the present condition of the maker, and not that he will be good at any future time, and if the jury believe that Harrison was solvent at the time the note was transferred, then the plaintiff cannot recover.

6th. That unless the defendant had said that Harrison would be solvent when the note became due, then the plaintiff cannot recover unless it was shown that he was insolvent on the day of the representation.

All these charges the Court refused to give, but charged the jury as follows:

1st. That if the jury believe, from the evidence, that Corbett gave this note to Gilbert in part payment for the negro, and at the time represented said note to be good and collectable, and Gilbert took the note upon the faith of such representations, and if said note could not be collected, after the

use of proper ordinary diligence, he (Corbett) is liable to Gilbert in damages.

2d. The best and highest evidence of insolvency is the return of *nulla bona* by the Sheriff, on the *fi. fa.*, against the party.

3d. The measure of damages in this case (if they find for the plaintiff) is the principal and interest due on the note.

To these charges, and refusal to charge as requested, the defendant excepted.

The jury found for the plaintiff the sum of \$600 and interest.

On the motion of the plaintiff's counsel, and after the jury had dispersed, the Court permitted them to change the verdict of the jury as follows: "We, the jury, find for the plaintiff the sum of \$775 50, as damages." To the entering up of judgment on the verdict the defendant excepted.

Counsel for defendant moved for a new trial on the following grounds:

1st. Because the Court erred in not sustaining plaintiff's demurrer to said declaration.

2d. Because the Court erred in admitting the testimony of Samuel S. Stafford.

3d. Because the Court erred in refusing to give the charges, each and all of them, as requested by defendant's counsel.

4th. Because each and all of the charges, as given by the Court, were wrong.

5th. Because the verdict was contrary to law.

6th. Because the verdict was contrary to the charge of the Court.

7th. Because the verdict was contrary to evidence.

8th. Because it was manifestly against the weight of evidence.

9th. Because the verdict was contrary to law and evidence.

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The motion for a new trial was overruled by the Court and counsel for the defendant excepted, alleging that the Court erred,

1st. In overruling the defendant's demurrer to the declaration.

2d. In admitting the testimony of Stafford.

3d. In permitting the amendment of the verdict.

4th. In refusing to grant a new trial on each and all the grounds contained in defendant's *rule nisi*.

HOOD & ROBINSON, for plaintiff in error.

LAW & SIMS; and PERKINS, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

The error assigned on the refusal of the Court to sustain the demurrer to the declaration is abandoned by the plaintiff in error.

The several rulings of the Court, objected to by plaintiff in error, are made grounds for a new trial, and are embraced in the assignment of error on the judgment of the Court overruling the motion for a new trial, except the decision in relation to the amendment of the verdict.

[1.] The jury found a verdict for six hundred dollars and interest, from the 17th day of July, 1853. The Court directed the verdict to be amended so as to include the interests, making the sum of principal and interest the verdict. On calculating the interest from the time specified in the verdict, to the time the verdict was returned, and the addition of the interest to the principal, it will be found that the verdict, as amended, corresponds exactly in amount with the verdict as originally rendered. It is only an amendment in form and according to the intent of the jury. The amendment was allowable. (*Evans vs. Rogers*, 1 *Kelly*, 467.)

We will now proceed to the consideration of the errors as-

signed on the refusal of the presiding Judge to grant a new trial.

[2.] The first assignment insisted on, is the admission of the testimony delivered by Samuel S. Stafford. It was objected that his information, in relation to the facts testified to by him, was obtained by reason of, and during the relationship of client and attorney. Mr. Stafford was called on by the parties to write a bill of sale for the negro, who was sold. There was no confidential communication made to him. The testimony given by him was the conversation which passed between the plaintiff and defendant in respect to the contract, in his presence, at the time he wrote the bill of sale. The statute prohibiting attorneys from giving evidence does not apply to a case like this, and his evidence was properly received.

The next assignment of error is for refusing the new trial, on the third ground taken in the motion, viz: because the Court erred in refusing to give in charge to the jury, each and all the requests of the defendant's counsel, and in giving the charge as set forth in the record.

[3.] The first request ought not to have been given, because it is not true as a legal principle, and because, if it were, it has no application to the case. The action is not on the transfer, but on the alleged fraudulent representation by which the plaintiff was induced to receive the note.

There is nothing in the record to warrant the second and third requests of the Court to charge the jury. There was no promise to guarantee the note in this case proven, and it would have been error in the Court to have charged the jury, as requested in this respect.

[4.] The fourth request ought not to have been given in charge to the jury as asked. If the defendant made a positive statement to the plaintiff that Harrison was solvent, in order to induce the trade, when, from circumstances he ought to have known his condition, and he knew that he was sup-

posed by the plaintiff to be acquainted with it, and Harrison was at the time insolvent, he is liable.

[5.] The Court ought to have instructed the jury as fifthly requested, that a representation that a person is good or solvent, has reference to the time when the representation was made, and that if the jury believed that Harrison was solvent when the note was transferred, the plaintiff cannot recover. This is a correct principle, and the attention of the jury ought to have been called to Harrison's circumstances at the time, that they might have determined from the evidence before them, whether his property was adequate to the payment of the note traded to plaintiff, and the debts which he then owed to others. If the property which he then owned in his own right was adequate to the payment of all, he was solvent; if not, he was insolvent.

[6.] There was no necessity for the sixth request, and as there was no evidence of a guaranty of the continued solvency of Harrison, it was improper. But perhaps there might have been no objection to the charge as requested, with a qualification, that unless from the facts in proof, the jury should believe, the representation had reference to the collectibility of the note at maturity.

[7.] We will now examine the charge, as given by the Court to the jury, and in considering it we must have regard to the case made in the pleadings. The plaintiff alleges, in substance, that to induce him to receive the note in part payment for the negro sold by him to defendant, the latter falsely represented that Harrison, the maker of the note, was solvent; and also, that the defendant knew at the time he made the representation, that he was insolvent. Issue was joined on these allegations. The plaintiff, to make out his side of the case, ought to have proven affirmatively both these allegations, to the satisfaction of the jury. The representation that Harrison was solvent at the time, when in fact he was insolvent, was the first branch of the issue. That his insolvency was known to the defendant, was the second matter in issue.

Both of these allegations must be established by direct proof, or by circumstances in a manner to satisfy the jury. We think that the Court erred in not charging the jury on the second point.

[8.] We think that there is higher and better evidence of a person's insolvency than a return of *nulla bona* on an execution against him. Such a return is unquestionably evidence of his insolvency, but not the highest evidence of it. His discharge under the insolvent debtor's act would be certainly more conclusive evidence. The charge of the Court in that regard was calculated to mislead the jury. They may have considered that evidence, under the charge of the Court, as entitled to such controlling effect, as to exclude all other matters on the question of solvency from their consideration.

The other grounds in the motion for a new trial, that the verdict was contrary to law; that it was contrary to the charge of the Court; that it was contrary to the evidence; that it was contrary to the weight of evidence; and that it was contrary to law and evidence, it is scarcely necessary to consider, as we reverse the judgment of the Court below on the grounds already passed upon. We will barely remark that if our judgment rested on them alone, we do not know that we would interfere with the discretion of the presiding Judge, who refused the motion.

Judgment reversed.

JOHN SMITHWICK, et al., caveators, plaintiffs in error, vs.
CLEMENT A. EVANS, ex'or, defendant in error.

[1.] A woman cannot be impeached as a witness by proof that she is a common prostitute.

[2.] An attorney employed in a cause, may, when it is relevant, be examined as to the amount of his fee, and the terms on which it is to be paid.

Smithwick et. al. vs. Evans, exe'or.

[3.] A will may be impeached by extrinsic evidence, as violative of the Acts of 1801 and 1818, prohibiting the emancipation of slaves in this State.

Caveat to will, from Stewart Superior Court. Tried before Judge KIDDOO, at April Term, 1857.

1st. The caveators having introduced and examined Frances Andrews as a witness, the propounders, by way of impeaching and discrediting her testimony, proposed to prove by B. K. Harrison, Esq., that she was a notorious prostitute. Counsel for caveators objected. The Court overruled the objection and admitted the evidence, and counsel for caveators excepted.

2d. Counsel for caveators proposed to ask E. H. Beall, Esq., one of the witnesses to the will, and the attorney who drafted it, and who was of counsel for propounders in this cause, the amount of his fee, and upon what terms it was to be paid. To this question counsel for propounders objected; the Court sustained the objection, and counsel for caveators excepted.

3d. Counsel for caveators requested the Court to charge the jury, that the will, so far as it provided for the emancipation of certain slaves, was repugnant to the Acts of 1801 and 1818, and void. The Court refused so to charge, but, on the contrary, charged that the will was not repugnant to said Acts, and not void. To this charge and refusal to charge counsel for caveators excepted.

BARRY; and B. S. WORRILL, for plaintiffs in error.

TUCKER & BEALL; and HOLT, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

[1.] The caveators introduced Frances Andrews as a witness, whose testimony was given. To impeach her credit, the propounders introduced a witness who testified that she was, by reputation, a notorious prostitute. The testimony of the latter witness was objected to, but the objection was over-

ruled. This decision of the Court is excepted to, and that exception constitutes a ground of error.

This Court has already decided that the mode of impeaching a witness for defect of character is to prove by witnesses who know his or her *general* character, and that from such knowledge they would not believe him or her on oath. *Stokes vs. The State*, 18 Ga. Rep. 37. It does not follow, necessarily, that because a woman is a prostitute, she is incapable of telling the truth. It is a great blemish in character, but there is no reason wherefore she should be placed in a worse condition than other persons of depraved character. It is possible, that while she is unquestionably immoral in a degree to exclude her from respectable society, she may have established a good character for truthfulness. If so, and upright witnesses will not impeach her character in that respect, there is no reason why her testimony should not be received.

[2.] The exception to the decision of the Court sustaining an objection to the admissibility of the testimony of E. H. Beall, Esq., constitutes the next ground of error. Mr. Beall is a subscribing witness to the will, and counsel for the propounder. He had been examined by the propounder of the will. The question was as to the amount of his fee, and the terms on which it was to be paid. It was not a matter of confidential communication from his client that he was interrogated to; nor was it as to a matter or thing which he acquired from his client, or during the existence or by reason of the relationship of client and attorney. It was in regard to a matter which must have been necessarily agreed upon before the relation of client and attorney could exist. It was, *prima facie*, relevant to the matter in issue. He ought to have been required to answer the question.

[3.] After the evidence was closed, the counsel for the caveators requested the Court to charge the jury, that the will, so far as it provided for the emancipation of certain slaves therein mentioned, was repugnant to the Acts of 1801 and 1818, prescribing the mode of manumitting slaves in this

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State. The Court refused to give said request in charge to the jury, but on the contrary, charged the jury in substance that the said will was not repugnant to said Acts, and was not void. This charge and refusal to charge are excepted to.

The testator directs and desires his negro woman Jane and her four children to be placed under the charge of the American Colonization Society, to be conveyed by the society, and under its charge, to Liberia, in Africa, and there to be set free according to the laws of that country. The testator further directs, that if his wishes as above expressed, cannot be carried out either by his executors or the society, that his executors shall carry the said negroes to some State in the United States, where, according to the laws therein, they can be set free.

The expenses of carrying the said negroes to Liberia or to a free State, were to be first paid out of the proceeds of the sale of his property, as directed in the second item of his will.

If the Colonization Society refuse, or do not provide the means or expense of their transportation to Liberia, his executors are to pay them.

He does not wish Jane and her children to be hired out, provided there is a sufficiency of money arising from the sale of Henry and his other property, to pay their expenses to Liberia or a free State.

He desires his executors to have them carried to Liberia or a free State, as soon as it can be done after his death.

In the mean time, between his death and their departure, his executors are to have the said negroes in trust for the purposes aforesaid.

By the second item in the will, he directs a negro man Henry, and all other property he might leave at the time of his death, to be converted into money, and his funeral expenses and debts to be paid.

If the sale of the other property should not raise a sum sufficient to defray all the expenses that might accrue in the settlement of his estate, he authorizes his executors to hire

out his negroes until there may be a sufficient fund to defray all expenses of carrying out the provisions and intentions of the will.

This Court has decided that the Acts of 1801 and 1818 do not prohibit extra-territorial manumission, provided it is not the testator's intention that the negroes are, during an intervening period between the death of the testator and their removal from the State, to be free, or enjoy their freedom within the State. Whether this will violates the said Acts, according to this interpretation of them, depends in some measure, we think, on evidence outside of the will.

The will is skillfully drawn to avoid the operation of the Acts of 1801 and 1818 as construed by this Court. But, nevertheless, if it be, in fact, violative of those Acts, it cannot stand.

If it be not apparent on the face of the will, that *it is not* in violation of the Acts of 1801 and 1818, the charge, that it is not repugnant to those Acts, is erroneous.

It is not certain, from the terms of the will, that the testator did not intend the negroes, Jane and her children, to remain in Georgia, free, an indefinite length time.

By the second item in his will, he directs that Henry and *all other* property which he had at the time of his death be sold. If Jane and her children were property, and left by him as property at the time of his death, they were, by the directions of the will, to be sold. If they were not left as property, they could not be sold. They must have passed to the executor, on the death of the testator, either as property, or in trust, as free persons of color. The bequest to them of extra-territorial freedom was inconsistent with their sale under the general direction in his will for the sale of all the testator's property, and being a later clause in the will, it must prevail, unless it be illegal and void according to the construction placed by this Court on the statutes of 1801 and 1818. In determining this question, the will itself must be

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looked to, as well as facts extrinsic to the will. If it appear by evidence that the provisions of the will cannot be executed, without the enjoyment of freedom by the slaves emancipated, within this State, contrary to law, the bequest of freedom is void. It must appear that this state of things is not attributable to the misconduct of the executor, for the negroes must not be subjected to the loss of the freedom intended for them by the testator, by his mismanagement. But if it be impossible to execute the provisions of the will, except by violating the law, it cannot be done, and every thing must yield to the public policy on which the law is founded.

I have perhaps said enough on this subject, as the case goes back for a new trial on other grounds.

Judgment reversed.

JAMES W. BROWN, plaintiff in error, vs. **SOLOMON NEWSOM**, et al., defendant, in error.

M. bought of N. a tract of land, and took a bond for titles, conditioned as follows: "The above bound N. holds a Sheriff's deed to said land which was sold under execution, and the said N. being apprehensive that a claim may shortly be set up by some other person to said land, agrees that if he establishes his title when said apprehended claim is made, that he will then make to said M. good and lawful titles, and that if he fails to establish his title, and the land should be claimed and held by suit at law, by another, before the notes for the purchase money become due, then he shall give up said notes, and if said apprehended claim should be established after said notes have been paid, then N. shall pay back to M. the amount so paid, and interest; and if suit for said land is brought against M., N. binds himself to pay cost and expenses." More than twenty years elapsed after the date of this bond, and the purchase money never having been paid, and titles never having been executed by N., he brings ejectment against the assignee of M. for the land. *Held*, That upon the payment of the purchase money and interest by M's assignee, he was entitled to hold the land against N. and that his rights under the bond were not affected by the statute of limitations, or lapse of time.

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In Equity, from Dooly Superior Court. Decision by Judge POWERS, at October Term, 1857.

Motion to Dissolve Injunction.

This bill was filed by James W. Brown, against Solomon Newsom, Henry D. Mashburn, and Louisa Oliver, for relief, discovery and injunction.

The bill alleges in substance, that in October, 1833, Newsom sold to one David Mashburn, a tract of land in Dooly county, for the sum of two hundred dollars, one half payable 25th December, 1834, and the other half payable 25th December, 1835, and for which Mashburn gave his notes. Newsom at the same time executing and delivering to Mashburn his obligation in the penal sum of two hundred dollars, conditioned as follows, viz: "The above bound Solomon, holds a Sheriff's deed to said land, which was sold under execution in favor of Newsom, and bought by him, and the said Newsom, being apprehensive that a claim may shortly be set up by some other person to said land, agrees that if he establishes his title when said apprehended claim is made, that he will then make to said David Mashburn good and lawful titles to said land, No. 179, third district Dooly county, and that if said Newsom should fail to establish his title and the land should be claimed and held by suit at law by another, before the said notes become due, then he shall give up the said notes, and if said apprehended claim should be established after said notes have been paid, then Newsom shall pay back to Mashburn the amount so paid for said land and interest; and if the suit for said land is brought against Mashburn, Newsom binds himself to pay the cost and expense thereof."

The bill further states, that in virtue of said contract, Mashburn entered into possession of said land and remained in possession of the same until his death in 1835. That said lot of land although not cleared or improved by Mashburn in his lifetime, nor by his administrators or distributees after

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his death, yet the same was contiguous to his other lands on which he resided, and on which he made improvements, and the lot purchased of Newsom was held as part of his settlement, and from which he, and his distributees after his death, cut timber and firewood. That Mashburn died intestate, leaving as his heirs at law his widow, and three children, Henry D., Elizabeth, and Louisa Mashburn; the latter of whom subsequently married James G. Oliver, now deceased. That the widow of said David died in 1835, and his daughter Elizabeth, five or six years afterwards; that there was no administration on the estate of either. That administration on David Mashburn's estate was granted to Allen Waters in 1835; that suits were instituted in the lifetime of David Mashburn for said land, but at whose instance or of what precise character, complainant is not able to state on account of the record being destroyed by fire; but said suits were determined in favor of Mashburn's estate in 1836 or 1837, and Waters the administrator, afterwards tendered to Newsom the principal and interest due for said land, and demanded of him titles for the same, which he refused to receive; and also refused to execute titles, saying that "at the end of seven years from that time, he would make titles upon payment of the notes." That said land was returned, inventoried, and appraised as the property of David Mashburn, deceased, and as such duly administered, and that letters of dismission from the administration have been granted.

That in 1843 or 1844, the estate of David Mashburn was divided agreeably to law, between the said Henry D. Mashburn and James G. Oliver, in right of his wife, and that due return was made of said division to the proper Court, but the records thereof destroyed by the fire aforesaid, which occurred in 1847; that said land with other adjoining lots, fell to the share of Oliver, and was used and held by him as part of his plantation.

The bill further states, that on the 10th December, 1843, complainant purchased said lot of land, together with another

er lot and a half contiguous thereto, from said Oliver, for the sum of \$3,200—lot No. 179, being estimated at about \$1,250—and received from Oliver his deed for the same; and that he has made extensive and valuable improvements thereon, and said lot is now worth \$3,000. That Newsom brought an action against complainant for said land, to April Term, 1855, of Dooly Superior Court, to which he pleaded the general issue and the statute of limitations, and upon the trial at May term, 1856, a verdict was had and judgment entered against complainant for said lot, and from which judgment complainant appealed, and the cause is now pending on the appeal in said Superior Court.

The bill alleges that at the time complainant purchased said lot from Oliver, he had no knowledge or intimation of any outstanding or adverse title in another. That Oliver is dead and his estate insolvent, leaving his wife, the said Louisa, surviving: Offers to pay Newsom the principal and interest of the original purchase money due by Mashburn; prays that upon the payment of the purchase money and interest, that Newsom be compelled and decreed to execute to him good and legal titles to said land, and that said Henry D. and Louisa refund to him, whatever sum he shall pay Newsom; or at least, that Newsom shall pay to complainant the value of the improvements he has put upon said lot, and that he be enjoined from the further prosecution of his said suit at law.

The injunction issued upon the fiat of the Judge.

The defendant Newsom, demurred to the bill:

1st. For misjoinder of parties; no sufficient cause being shown in the bill for joining him with the other defendants.

2d. Because there was no equity in the bill; more than twenty years having elapsed since the sale of said land to Mashburn, without any consideration whatever, except his insolvent notes, not a dollar of which has ever been paid.

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And with his demurrer, defendant Newsom answers the bill, admitting the contract with David Mashburn, for the sale of the land, as set out in the bill, but denying that Mashburn or any one else ever took possession of said land until complainant entered, shortly before the commencement of said suit against him by defendant; and submits that the occupation and improvement of adjoining lands by Mashburn could in no sense be held as an occupancy or possession of lot 179. Has no knowledge when Mashburn died, nor who are his heirs at law, nor does he know anything about any suits against him for the recovery of said land, and does not believe there were any. Denies that there ever was a tender to him of the amount due on the notes for the purchase money, or that he refused to receive the same, or made the remark alleged in the bill; no such tender was ever made, nor any such conversation ever held. At that time, he would have been glad to have received the money and made titles to said land, as he was ever ready to do, until the notes were barred by the statute of limitations. Knows nothing of said lot being appraised as part of the estate of David Mashburn, or its division amongst his heirs at law; knows nothing of complainant's purchase from Oliver—Oliver had no legal title to the land, and this was notice to complainant not to buy. Does not admit that either Mashburn or Oliver occupied or improved said lot, and is informed and believes they never did. Admits that said lot is valuable, worth two thousand dollars or more, and that he has commenced his suit at law against complainant for its recovery. Pleads lapse of time as a bar to complainant's claim.

The defendant Newsom, upon the filing of his answer, moved to dissolve the injunction and dismiss the bill as to himself.

After argument, the Court granted the motion; dissolved the injunction, and dismissed the bill as to Newsom. . . .

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To which decision counsel for complainant excepts.

MILLER & HALL, for plaintiff in error.

S. T. BAILEY, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

Independent of the allegation in the bill, of the tender of the purchase money by Waters as the administrator of Mashburn, which is denied by the defendant, we hold, that there is equity in the bill.

The bond itself is peculiar. It contemplates, that the vendee will go into possession of the land, for it is so expressed upon its face; but when or how long it might be before titles could be made, is uncertain. The notes for the two installments of the purchase money fell due at the end of the years 1834 and 1835, respectively; and there was nothing to prevent their collection. If the land was recovered of Mashburn before the notes were paid, they were to be given up. If afterwards, the amount with the interest was to be refunded. There was nothing in the contract, we repeat, to prevent the collection of these notes. Why has payment of the purchase money never been demanded? Is there no fault on the part of the vendor, in this matter,—especially looking to the contingency in the bond, upon which he was to make titles? There was some obligation upon him to move in this matter. He had a right to suppose that Mashburn was occupying the land, for the bond says, he was to go into possession. Why does Mr. Newsom stand aloof, and even now treat the subject as though he had no more to do with it than any third person? Had he performed his duty, Brown would not have been involved in the unpleasant predicament of having purchased a lot of land at a high price, upon which he has made valuable improvements, and bought it too, not of squatters or interlopers, but of the heirs of him to whom it was sold by Mr. Newsom; and who have never

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refused to comply with their part of the contract. For it is a singular fact, that Mr. Newsom has never taken the first step to collect his money ; and the vendee has never refused to pay the price stipulated ; and while the *vendor* is setting up the plea of the statute of limitations for the vendee, as an excuse for not performing his part of the agreement, the vendee repudiates the interposition of this shield to screen him, and says, no ; “ I will pay the money, and here by my bill offer to do so ! ”

Had Mr. Newsom demanded his pay instead of resorting to an action of ejectment, he might have got it, and this is all he ever was entitled to. He prefers however to wait twenty years and then bring ejectment for the land, and say in his answer to the bill, that he would gladly have made titles at any time before the notes for the purchase money were barred, while no one pleads the bar but himself. The vendee does not ; and whose fault is it, that they are barred. We insist from the nature of the contract, that the *vendor* had something to do himself, relative to this matter.

This is not a case for the statute of limitations, on either side. The possession set up under the bill, is not to constitute a statutory bar, by reason of an adverse holding. The vendee could never acquire a statutory title as against the vendor in this case. His possession might be adverse as to third persons, and so Mr. Newsom himself seems to think. For he says that, the outstanding claim which he apprehended, was at the instance of one Byne of Burke and which he says “ must have been long since barred. ” How barred ? Mr. Newsom himself has never been in possession, nor any one else, except Mashburn, and those holding through him. And yet the defendant while denying all knowledge of their possession, and expressing the belief that the lot never was occupied until bought by Brown in 1853, still thinks that Byne has been barred long since, by reason of this very possession.

Why then, under the circumstances, should Mr. Newsom

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not be decreed to accept the purchase money and execute a title, and be perpetually restrained from the further prosecution of his suit at law, to recover the land? This was his bargain, the other side have never repudiated it. They are willing to pay and pray to be permitted to do so. If they have been negligent, Newsom is far from being blameless in the same respect. True, lands may have risen in value; why did he not collect his money twenty years ago, that he might have re-invested it, as he says, he could have done, and *perhaps lost it*? He no doubt took less for the land than it would otherwise have brought, on account of the cloud which hung over the title. The purchase money with interest thereon at eight per cent. will amount at this time to some six hundred dollars. Be this sum more or less, than the present value of the land, there is more equity in compelling him to comply with his contract, than to allow him to evict the tenant under the facts of this case. If the legal bar of twenty years has not run against Newsom's bond, and from the proof, it had not, it is needless to talk about lapse of time. It has no application to the case. From 1837, to the filing of the bill for specific performance, is less than twenty years. Apart from strict law, however, we think the equity of the case is with the complainant.

Judgment reversed.

MARK A. COOPER, et al. executors, plaintiffs in error, vs.
JOHN A. JONES and others, defendants in error.

[1.] It is too late to move to dismiss a bill in equity, several Terms after it was filed, on the ground that a sum of money admitted to be due by complainants, has not been deposited in Court. The Court below ought to be moved, to compel them to bring it in.

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- [2.] When a bill of interpleader is filed by trustees to obtain the directions of a Court of Chancery, and a proper case is made, it is too late for defendants after long acquiescence, to move to dismiss it, on the ground that it was filed too late.
- [3.] When a matter is brought up in which the Court below has a discretion, unless it appears in the record, that that discretion has been used oppressively and illegally, this Court will not interfere. Every discretion of the Court is a legal and not an arbitrary discretion.
- [4.] Every counsel engaged in a cause ought to be prepared to conduct it, and the absence of counsel for any cause, when there is more counsel than one, ought to be seldom allowed as a ground of continuance.
- [5.] Complainants in a bill of interpleader may appeal, if their individual rights are affected by the decree; and that one of the parties called on by said bill to litigate their rights does not appeal, does not impair or destroy the right of appeal of the complainants in the bill of interpleader.

In equity, from Muscogee county. Decided by Judge Worrill, November Term, 1857.

A motion was made in the Court below by Simeon Smith and others, some of the defendants, to have the bill dismissed on the following grounds:

1st. Because the said complainants did not and have not deposited in Court the amount of money admitted to be due and owing said defendants.

2d. Because complainants did not file their said bill until said defendants had proceeded with their cause to the appeal, and for an unreasonable time thereafter.

3d. Because there is no equity in said complainant's bill.

The Court overruled the motion on the first two grounds, but refused to entertain the third ground because the case was not on the final hearing. To these decisions of the Court the above named defendants, who made the motion, excepted.

When the case was called for hearing on a subsequent day in the same Term, a motion was made to the Court by the Jones' for a continuance, on the ground that Col. Seaborn Jones their leading counsel in the case, was

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unable from sickness to attend. It was proved on cross examination, that the case had been continued at the last Term, by the Jones' on the ground that certain interrogatories had been lost by Mr. R. J. Moses, who was then of counsel, for the Jones'; that one of those defendants knew of the sickness of Col. Jones, in time to have procured other counsel, and had in fact attempted to retain other counsel, and that there were two other counsel engaged in the case for them.

The Court continued the cause, and the counsel for the Smiths filed their bill of exceptions, assigning as error the several above stated decisions of the Court.

Judge BENNING, having been formerly of counsel in this case, did not preside.

JAMES JOHNSON, for plaintiffs in error.

B. HILL, for defendants in error.

By the Court.—McDONALD, J. delivering the opinion.

[1.] Several Terms of the Court have passed since the filing of the bill of interpleader in this case, and it is now too late to move to dismiss the bill, on the ground that the amount of money shown to be due and owing the defendants has not been paid into Court by the complainants. If the defendants claim to be entitled to have it paid in, they should move the Court below to that effect and have the right decided.

[2.] The bill of interpleader is filed by trustees, asking the direction of the Court, for their own protection. The bill shows a complicated state of things, and one in which a Court of Chancery may well be appealed to for instructions and after so long acquiescence, in the right of complainants; so to proceed, it is too late for defendants to dispose of the

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case by a summary motion of this sort, even if the motion was in its order before the Court.

We therefore decide that there is no error in the refusal of the Court below to dismiss the bill on the said two grounds in the motion.

[3.] The Court refused to entertain the motion of defendant's counsel to dismiss said bill for want of equity. He put his refusal to hear the motion on the ground, that the bill was not up for a hearing. It was no error in the presiding Judge to refuse to entertain the motion, for the reason assigned by him, for he had the discretion to hear it or not. But we do not hesitate to say, that if the motion was before him, in its regular order, on the motion docket, he ought to have heard it, unless in his judgment it would have interfered with his usual course of business in Court to have done so. There is nothing in the record, however, to show to us that the discretion of the Court below was used oppressively and illegally, and without that we will not control him. Every discretion of the Court is a legal and not an arbitrary discretion.

[4.] When the cause was, at a subsequent time, called, in its order, for trial, a motion was made by the defendants Jones, for its continuance, on the ground, that their leading counsel was sick, and had been for some three weeks. There were other counsel in the cause, but it does not appear how long they had been employed. The record exhibits a case presenting many issues, involving intricate and difficult facts and principles, which would require of the ablest counsel much labor and investigation, to prepare for an argument of the cause. Under these circumstances, we will not interfere with the judgment of the Court. But we will remark that every counsel employed in a cause, ought to be prepared to conduct it, in the absence of his associates, and that the absence of counsel, where there is more than one attorney employed in the case, although he may be the leading counsel, ought to be seldom allowed as a ground of continuance. A

continuance of a cause might result in the irreparable injury to the adverse party whose witnesses might die, by whose evidence alone he might have it in his power to establish his rights.

I doubt exceedingly if either point brought up in this record, could legally have been presented to this Court for revision, under the law of its organization.

A motion was also made in this cause by Simeon Smith, and the Wrights to dissolve the injunction in said cause, on the grounds:

1st. That Simeon Smith and the Wrights did not appeal from the verdict and decree in this cause, and that the litigation is ended as to them.

2d. Because the complainants have failed and neglected to prosecute their cause with due diligence.

3d. Because the cause was continued at this term of the Court by the complainants.

B. Hill, Esq., stated in response to the motion to dissolve the injunction that previous to the May Term of the Court, he had filed an amendment to the bill of complainant, which was received; that said amendment was lost, and that twenty days before that term of the Court, he had re-filed the said amendment and served the same on the defendants, and that said amendment had not been answered. The Wrights and Smith objected to the making of this statement, and on its being allowed by the Court to be made, they excepted.

[5.] The bill of interpleader was filed by the complainants thereto as trustees, that the parties might be compelled to litigate their rights together touching the matters in contest, for their security, and believing that the decree affected their interest personally, they appealed, and they are entitled to a continuance of the injunction, if upon a view of the whole case, the principles of equity and the rights of the complainants require it. This is a matter so much in the discretion of the chancellor, who has the whole subject be-

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fore him, that we will not control him. The failure of one of the parties called on to litigate, to appeal, cannot impair or destroy the rights of the complainants to the bill of interpleader, to have a re-hearing on appeal.

On none of the other grounds will we attempt to control the discretion of the presiding chancellor in the Court below.

Judgment affirmed.

JAMES E. JORDAN, plaintiff in error, vs. **BENJAMIN F. RHODES**
and **AZARIAH DOSS**, defendants in error.

If A. sells land to B. giving him a bond for titles, and subsequently conveys to C. who has full knowledge of the prior sale, he is in no better condition than A., but is affected with all the equity existing between the previous parties. Notwithstanding time is of the essence of the contract, it may be waived; and a subsequent offer to fulfill the contract, and urging a compliance on the other side, instead of treating the contract as at an end, amounts to a waiver.

In Equity, from Randolph county. Decision by Judge KIDDOO, at May Term, 1857.

The facts of this case, are fully stated in the opinion of the Court.

HOOD & ROBINSON, for plaintiff in error.

DOUGLASS & DOUGLASS, for defendants in error.

By the Court—LUMPKIN J., delivering the opinion.

In February, 1852, Doss sold Jordan, lot of land No. 256, in the 6th district of Randolph county, for \$350; \$175 of which was to be paid the next Christmas; and the other half the Christmas thereafter the whole to bear interest

from date, if not punctually paid. In February, 1853, the purchase money being unpaid, the contract was renewed. Doss took Jordan's note for \$422 25, payable the 25th of December next, afterwards, and gave him a new bond for titles, upon condition, that the price was paid punctually, without trouble or expense to the vendor. Jordan remained in possession of the land under this purchase, having originally been found upon it as a squatter, when the trade was made.

This last contract was not fulfilled. But notwithstanding the failure on the part of Jordan, Doss some years thereafter, prepared a deed and tendered it to Jordan; and urged him to pay the purchase money. Failing to do so still, Doss sold the lot of land to Rhodes for \$500; \$300 of which has been paid, and the balance of \$200, is still owing. The inference is from the proof, that Doss at the time he sold to Rhodes, not only made him a warranty deed to the land, but also turned over to Rhodes, Jordan's note.

To the April Term, 1855, of the Superior Court of Randolph county, Rhodes brought his action of ejectment against Jordan, to get possession of the land; and at the ensuing October Term, a suit was brought in the name of Doss against Jordan, upon Jordan's note. It is not pretended that it was the intention of either Doss or Rhodes to recover the land, and likewise Jordan's note. But the idea was, that if the ejectment failed, payment of the note should be enforced.

Jordan now files his bill to enjoin these proceedings, and offers to pay for the land, provided he can get titles, which he prays to have made under a decree of the Court. The injunction was granted by the Court, but upon the filing of the answer, the Court upon motion, dissolved the injunction, and it is to reverse this interlocutory order, that this writ of error is prosecuted.

We had best in the first place, disentangle this case of the complicity growing out of the re-sale of the land by Doss to

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Rhodes. Rhodes bought with full knowledge of the previous sale to Jordan. Jordan was not only in possession of the land, which should of itself have put Rhodes upon enquiry as to the nature of his tenure; but Rhodes admits, that he saw the note given by Jordan to Doss, which note states upon its face, that the consideration of the note was the price of this lot of land: and that is not all, Rhodes says that Doss told him of the previous sale.

The question then is narrowed down to this; conceding that time, is of the essence of this contract, and more is not asked; what are the relative rights of Doss and Jordan; for we drop Rhodes altogether, and treat the transaction as though Doss and Jordan were alone the parties to it. In law, it is the same thing.

Doss then, some twelve months after Jordan's last note fell due, tendered Jordan a title, and insisted on the payment of his note. So far from demanding a rescision of the trade or treating it as at an end, by reason of the failure of Jordan to comply punctually with his agreement, he not only tenders a title, and urges the payment of the purchase money, but he subsequently turns over Jordan's note to Rhodes, and upon which an action has been instituted.

The remedy of Doss was three-fold. To sue in ejectment, and thus force Jordan to pay the purchase money, or be evicted from the premises; go into equity and obtain a decree for the rescision of the contract by being put into possession and delivering up the bond for titles, and the note of Jordan to be cancelled; or sue and obtain a judgment upon the note and have the land sold under the statute, to pay the debt. In the prosecution of either of these remedies, Jordan would have had the right to have arrested the proceeding by paying up the purchase money; and this he offers now to do.

We hold then, that the injunction should have been retained; and that upon the payment of the purchase money into

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Court, Jordan will be entitled to have a conveyance executed, either from Rhodes or directly from Doss; and the deed from Doss to Rhodes cancelled.

Judgment reversed.

FRANCIS THOMAS, adm'r, plaintiff in error, vs. CHARLES W. HORN, adm'r, defendant in error.

When the answer is indefinite and unsatisfactory, the injunction will not be dissolved; especially when it sets up matter in discharge of the defendant's liability.

In Equity, from Dougherty county. Decision by Judge ALLEN.

For a full statement of the facts of this case, see 19 *Ga. Rep.* 270.

The cause coming up again on a motion to dissolve the injunction upon the amended answer, the Court refused the motion and counsel excepted.

R. F. LYON, for plaintiff in error.

STROZIER & SLAUGHTER, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

This is the third time this case has been before this Court upon an application to dissolve the injunction. Had it been let alone, it might, long since, have been tried upon its merits with much less expense and trouble to the parties and the public.

When it was last up, we held, 1st. That the answer was

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too vague to authorize a dissolution of the injunction; and 2dly. That the injunction should be continued, because we were satisfied that all the facts necessary to a proper understanding and decision of the cause, were not out.

Since that time two amendments have been made to the answer; and it is again insisted that the injunction should be dissolved.

It is conceded, at any rate it is true, that if Thomas has, or had in his hands, as administrator of John M. Hampton, assets out of which the execution in favor of Samuel Jopp, obtained against John M. Hampton, in his lifetime, and now held by Andrew Y. Hampton, ought to be paid, that this *fi fa* constitutes a good set-off in equity against the 54 small notes upon which suit is prosecuting by Thomas, against the said Andrew Y. Hampton, as principal, and Horn, as the administrator of Wm. L. Hampton, who was security only upon said notes. Thomas pleads a want of assets, and alleges that he paid, out of his own funds, for the estate of his intestate, John M. Hampton, the amount of the 54 notes, which he claims as his own, over and above any effects in his hands, and his right to these notes is based alone upon the truth of this allegation. Amongst the debts discharged, is the decree in favor of Andrew J. Hampton against Thomas, as the administrator of John M. Hampton, on their copartnership dealings, which Thomas contends had a priority of lien even over the Jopp judgment, obtained against John M. Hampton, in his lifetime. And such, it is true, are the terms of that decree. It went upon the idea that this partnership debt was a trust, and consequently to take precedence even of judgments. It is true, that A. J. Hampton was a party to that decree, because it was rendered in his favor. But then Jopp was no party to that case; and Andrew J. Hampton claiming the judgment proposed to be pleaded as a set-off, holds under Jopp, through Lundy and wife, and as the assignee of the demand, is entitled to the same immunity as the previous holders. And hence, if it turns out that this partnership debt

was no trust claim, and the money paid to it was improperly applied, and not authorized by law, Andrew J. Hampton is not estopped by it.

Independent of this, the question of *plene administravit*, depends upon a full investigation of Thomas's accounts as administrator; and this Court is not capable, for want of time and other reasons, of making the necessary examination. It is a question of fact, to be inquired into by the jury, both from the records of the Ordinary, as well as *aliunde* evidence.

Moreover, all the property of John M. Hampton, including that for which these 54 notes were given, was bound by the lien of the Jopp judgment, obtained against John M. Hampton, in his lifetime. For the administrator to sell this property and appropriate the proceeds to himself under the allegation that the estate of his intestate is his debtor, by reason of the cash advances made by him, in discharge of the liabilities of the estate, the proof should be clear and convincing to the mind of the jury. We affirm the judgment of the Court below, believing as we do, that the answer, as amended, has not denied satisfactorily the equity of the bill. At least so much of the answer as is responsive to the bill.

Judgment affirmed.

JOHN BANKS, plaintiff in error, vs. ROBERT E. DIXON, adm'r,
defendant in error.

Upon an application to establish a lost paper, the affidavit as to the existence of the original, its loss, and the copy of the instrument, need not be made by the party, but by any one who best knows the facts.

Motion to establish a lost paper, from Muscogee county.
Decided by Judge WORRILL. May Term, 1857.

Banks vs. Dixon, adm'r.

A motion was made to establish a copy of a receipt, which had been mislaid or destroyed. In support of this motion an affidavit was made by William Dougherty, one of the firm of Dougherty & Stokes, to the effect that the receipt had been placed in their hands for collection, but that before the same was collected the original receipt had been lost, and that the copy attached to his affidavit was a copy, in substance, of the original receipt.

To the establishment of the copy upon this proof, the defendant objected, on the ground that under the Act of 1856, the copy should be verified by the affidavit of the party himself. This objection the Court sustained and refused to establish the copy; and to this decision plaintiff excepted.

W. DOUGHERTY, for plaintiff in error.

R. E. DIXON; and JONES & JONES, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

The only question in this case is, upon an application to establish a lost paper, must the copy of the instrument be sworn to by the party and nobody else, or may it be verified by one, in whose hands the paper was lost?

The Act of 1856 simply declares that "the copy shall be sworn to," without saying by whom. (*See Pamphlet Acts, p. 238.*) That being so, we see no reason why the affidavit may not be made by the person who best knows the facts and this was done in the present case.

Judgment reversed.

Wight vs. Hester, adm'r.

SAMUEL B. WIGHT, plaintiff in error, vs. **NATHANIEL HESTER**, adm'r of **JOHN B. WIGHT**, deceased, defendant in error.

- [1.] In an action of trover for promissory notes, the matter in issue is the title to the notes, and not the consideration for which they were given.
- [2.] If a jury find a verdict generally for the difference between notes, it is no error for the Court to send them back to find the amount.
- [3.] If the jury find against a fact, the proof of which depends on circumstantial evidence, the Court cannot, on a motion for a new trial, assume the fact as proven.
- [4.] A party cannot obtain a new trial on the ground of newly discovered evidence, when the evidence was in his own possession, and known to be so at the time.
- [5.] Promissory notes are evidence of their own value in an action of trover.
- [6.] In an action of trover for a promissory note, whether the party who made the contract, gave too much or too little for the property for which they were given, cannot be enquired into.

Trover and new trial, from Baker county. Tried before Judge ALLEN. May Term, 1857.

This was an action of trover brought by Nathaniel Hester, as administrator of John B. Wight, deceased, against Samuel B. Wight, to recover two promissory notes for \$1,000 each, which had been given to the said John B. Wight during his lifetime, by the said Samuel, in payment for negroes sold to him by intestate.

The jury, upon the evidence and charge of the Court, found for the plaintiff \$600, and cost.

Whereupon defendant moved for a new trial, upon the following grounds.

1st. (Abandoned by plaintiff in error.)

2d. Because the Court erred in charging the jury, that upon the soundness or unsoundness of the negroes, for which the notes in dispute were given, depended the liability entirely of the defendant. That if said negroes were unsound at the time of their sale to the defendant that the jury would deter-

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mine how much and deduct from defendant's liability, and if they were sound, they would find for the plaintiff.

3d. Because the jury returned their verdict into Court for the difference between the notes of Andrew Odum, turned over by defendant to the widow of John B. Wight, and the notes of defendant sued for, and were directed by the Court to return to their room and ascertain by their verdict the amount of that difference; and this too, after the jury had declared their inability to determine what that difference was.

4th. Because the evidence showed that the exchange of notes by defendant and John B. Wight's widow was voluntary and freely made upon the part of said widow, and that the plaintiff was also present, and that it was in accordance with the desire and intentions of the said John B. Wight.

5th. Because the jury found, contrary to the law and the evidence, and without any evidence to support their verdict.

6th. Because since the verdict or during the concluding argument of plaintiff's counsel, it came to the knowledge of defendant's counsel, that said defendant had notified the said John B. Wight, on the day after the negroes were received, that the negroes were not such as represented by the said John B. Wight, to defendant, and that they would not answer the purpose for which defendant had traded for them, and as represented by said John B., that they would; and that there was so much difference between the negroes and what John B. represented them, that defendant did not consider it a trade; and that John B. acknowledged the reception of said notice from said defendant, and expressed a desire and intention to compromise the matter, and that really it never was considered as a permanent trade between the parties. That said letter is now in the possession of the said plaintiff, or the former wife of John B. Wight.

7th. Because there was no evidence as to the value of the notes declared for.

8th. Because the evidence showed that the negroes were

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worth only about \$2,500, and that the defendant had paid that much money.

In support of this motion, on the 6th ground, the defendant made an affidavit of the facts set out therein.

Upon hearing the motion for a new trial, the Court overruled the same on all the grounds taken, and to this decision of the Court the defendant excepted.

LYON & CLARK, for plaintiff in error.

SMITH; and BOWERS, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

This was an action of trover for the recovery of two promissory notes of one thousand dollars each, which had been given by the plaintiff in error to the defendant's intestate, in his lifetime, in part payment for several negroes purchased from him. The negroes were alleged to be unsound by the purchaser, who had had a friendly correspondence with the intestate in his lifetime, and who had said that he wished the matter settled, and that he would lose something. The parties were brothers. The plaintiff in error had sold a part of the negroes for twenty-two hundred dollars, to a man named Odum, and he held his note for \$1200, a part of the sum. One of the negroes had died. Shortly after the death of the intestate, the defendant called at his house and proposed to exchange Odum's note for \$1200, for his two notes of \$2000. The exchange was made without difficulty on the representation, (according to one witness) of the plaintiff in error, that his deceased brother had agreed to allow the difference between the notes given and received. There was, at the time, no administration on the estate of the deceased. After the administration, the administrator collected the money on Odum's note, and according to the evidence of Griffin, the difference between the exchanged notes was about six

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hundred dollars, and the jury found that sum. A motion was made for a new trial on the several grounds mentioned in the statement of the case. The Court overruled the motion and the decision of the presiding Judge is excepted to.

The first ground is abandoned by the plaintiff in error.

[1.] We think the Court erred in charging the jury, that upon the soundness or unsoundness of the negroes for which the notes sued for were given, depended entirely the liability of the defendant; that if the negroes were unsound at the time of the sale, the jury would determine how much they would deduct from the defendant's liability; and if they were sound they would find for the plaintiff. In this action the matter in issue between the parties, was the title to the promissory notes sued for, and that depended, in no manner, upon the soundness or unsoundness of the negroes.

The trade in regard to the negroes was necessarily involved in the investigation, because the exchange of notes was made on the ground that it was claimed by the plaintiff in error, that the intestate had agreed to allow the difference between the notes exchanged as the amount proper to be allowed for the loss on the negroes. If that fact could be established to the satisfaction of the jury, the administrator could not make out his title, notwithstanding the exchange was made prior to an administration on the estate. If such was the agreement between the parties, and the administrator was satisfied of it, he ought to have made the exchange, if it had not been done prior to the administration, rather than to run his intestate's estate to the expense of litigating the matter. Upon this ground, and this alone, of all those taken in the motion, we think the Court ought to have granted a new trial.

[2.] There was no error in the order of the Court to the jury to return to their room and calculate for themselves, the difference between the exchanged notes and return a verdict for that amount instead of a verdict generally for the difference between the notes. The data for the calculation were

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before them, in the evidence, and their subsequent finding showed pretty well that they understood it.

[3.] The fourth ground assumes that the exchange of notes was made in accordance with the desire and intention of the intestate. There is no express evidence to that effect. It is a matter in controversy, between the parties, and must be decided by the jury upon all the evidence before them. If they find such to be the fact, the verdict, we do not hesitate to say, ought to be for the defendant, notwithstanding the exchange was made before administration.

As the case goes back, we pass no judgment on the ground that the verdict was contrary to evidence.

[4.] The newly discovered evidence might have been obtained before the trial by the use of diligence. It was in his possession.

[5.] The notes were evidence of their own value.

[6.] This was an action of trover for the notes, and involved no issue in respect to the value of the negroes, or the original contract between the parties. The question in regard to the recovery of the notes is one of title, and depends on the agreement between the parties in regard to the exchange of notes, and for that the parties must look to their correspondence and all the other evidence delivered.

Judgment reversed.

JOHN DOE *ex dem.*, G. H. O'BANNON et al., plaintiffs in error, vs.
RICHARD ROE, cas. ejector, and WILLIAM E. PAREMOUR,
tenant in possession, defendant in error.

[1.] A power of attorney for the conveyance of land in this State, executed in another State, when the subscribing witness is not produced in Court, nor examined by interrogatories, must be proved as required by the Act of 1755.

[2.] A Georgia Commissioner, resident in another State, has no power to certi-

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fy to the official character of a person who holds his office under the authority of that State.

[3.] A person having no title, conveying land by deed with warranty, and subsequently acquiring title, cannot recover the land from his feoffee.

Ejectment, from Stewart county. Tried before Judge KIDDOO. June, 1857.

The plaintiffs in error in this case, brought an action of ejectment in the Superior Court of Stewart county, against W. E. Paremour, tenant in possession, to recover possession of lot of land No. 239, in the 22d district of Stewart county. At the trial of this action the plaintiffs offered in evidence a power of attorney executed in Montgomery county, Texas, whereby Green H. O'Bannon appointed James R. Butts, his agent and attorney, to sell and convey the lot of land in question.

Defendant's counsel objected to the introduction of this power of attorney, which objection was sustained by the Court, and the power of attorney rejected. To this decision the plaintiffs excepted.

The specific grounds on which the objection to the admission of this power of attorney was founded, were not stated in the bill of exceptions. It appeared that the power of attorney was executed in Montgomery county, Texas, and attested by a Justice of the Peace for the county of Montgomery, (whose certificate was produced) and also by another witness, and the execution acknowledged before Charles B. Stewart, a Notary Public for the same county; but no affidavit of the attesting witnesses was produced, nor the certificate of the person authorized to take such affidavit, stating the addition and place of abode of the parties making it, as required by the 4th section of the Act of 1785, regulating the admission, as evidence in the Courts of Georgia, of powers of attorney executed in other States.

Defendant offered in evidence a deed from Green H. O'Bannon, to one Jarrett, of the lot of land in dispute, dated the

15th of November, 1833. To the introduction of this deed, as a conveyance of title, plaintiffs objected, on the ground that it was executed prior to the issuing of the plat and grant (which was dated the 23d day of December, 1837.) This objection the Court overruled, deciding that the issuing of the grant after the execution of the deed to Jarrett, (and O'Bannon not having, in the meantime, or since the issuing of the grant, deeded the land to any other person) enured to the benefit of Jarrett, and that O'Bannon was estopped by his deed with warranty to Jarrett, and could not dispute his title. To this decision the plaintiff excepted.

Plaintiff then offered in evidence the certificate of R. D. Johnson, to prove that Charles B. Stewart was a notary public. To the admission of this evidence the defendant objected, and the Court sustaining the objection, the plaintiff excepted.

By the consent of the parties, an order was taken dismissing the case; the same right of excepting and carrying the case to the Supreme Court being reserved to the plaintiff as if there had been a verdict for the defendant.

The plaintiff filed his bill of exceptions, alleging that the Court erred,

1st. In rejecting said power of attorney from Green H. O'Bannon to James R. Butts, and not allowing the same to go in evidence to the jury.

2d. That the Court erred in deciding that the deed from O'Bannon to Jarrett estopped him from denying the title of Jarrett to the land, and that the issuing of the grant after the execution of said deed enured to the benefit of said Jarrett, and vested a perfect title in said Jarrett.

The following note, made by the Judge of the Superior Court, appeared on the record opposite the 2d ground of exception:

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"The Court did not hold that it vested a *perfect title*, but that it was good against Bannon. D. K., J. S. C."

3d. That the Court erred in rejecting the certificate of R. D. Johnson, and not allowing the same to go in evidence to the jury.

TUCKER & BEALL, for plaintiff in error.

B. S. WORRILL; and W. S. JOHNSON, for defendants in error.

By the Court.—McDONALD, J. delivering the opinion.

[1.] The first assignment of error is on the decision of the Court rejecting the power of attorney executed by O'Bannon, in Texas, to James R. Butts, to convey the tract of land sued for. The land lies in this State. The power of attorney was attested by J. S. Thomason, and P. H. Spiller, a Justice of the Peace, of Montgomery county, Texas, and acknowledged before Charles B. Stewart, of the same county and State.

Appleton Gay, as Clerk of the County Court of the same county and State, certified to the official character of Spiller and Stewart respectively. But for our own legislation, the power of attorney in this case would, perhaps, be sufficiently proven. The official attestation alone of a Justice of the Peace or Notary Public of another, or a foreign State, without an affidavit, it seems to us, was not intended by our legislature, to be a sufficient authentication of a conveyance of title to land, or of a power of attorney under which a conveyance was made, to give it full force and effect. The act of 1785, prescribes the manner in which letters of attorney or other powers in writing executed in either of the United States shall be authenticated to be used as evidence in one of the Courts in this State. There must be proof of execution by one or more of the witnesses thereunto, by affidavit, or solemn affirmation in writing, before any Governor, Chief Justice, Mayor, or other Justice, and certified and transmitted under

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the common or public seal of the State, Court, city or place where the instrument is executed. The affidavit or affirmation must express the addition of the person making the affidavit or affirmation, and the particular place of his abode. *Cobb*, 165. This mode of authentication must be followed, when the subscribing witness is not examined in Court, or by interrogatories, when the opposite party will have the power of cross examination.

[2.] The certificate of Robert D. Johnson, the Georgia commissioner, as to the official character of the notary public in Texas, was inadmissible. He has no authority to make such certificates. A functionary of Georgia has no power to certify to the official character of a person who holds his appointment under another State.

[3.] The Court committed no error in admitting the deed from O'Bannon to Jarrett. It was a deed with warranty, and the only evidence before the jury was the grant in support of the demise from O'Bannon, and if O'Bannon were to recover under his demise, he would be immediately liable to an action for breach of warranty. This Court has already decided, that to prevent this circuitry of action, he must be held to be estopped by his deed.

Judgment affirmed.

 Watson vs. Tindall et al.

RICHARD ROE, casual ejector, and **JACOB WATSON**, tenant in possession, plaintiffs in error, vs. **JOHN DOE**, *ex dem.*, **JOSHUA TINDAL**, et al., defendants in error.

JOHN DOE, *ex dem.*, **JOSHUA TINDAL**, et al., plaintiffs in error, vs. **RICHARD ROE**, cas. ejector, and **JACOB WATSON**, tenant in possession, defendants in error.

[1.] The exemplified copy of a deed recorded in 1836, but without proof of its execution—the grantor signing his name by his mark—is not admissible in evidence, especially when it does not satisfactorily appear that the original ever existed.

[2.] A Sheriff's deed must be accompanied by the execution under which the land was sold, or the judgment upon which it issued.

[3.] A. being in possession of land, claiming it *bona fide* as his own, is informed by B., that the lot belongs to C. Whereupon, A. authorizes B. to buy the land for him of C. This is no attornment to C., especially when it turns out that C. was not the owner of the land.

[4.] A., under a parol gift from B., enters upon the possession of a lot of land and some five years thereafter, B. executes to A. a quit claim deed to the lot. *Held*, That the title does not relate back so as to constitute adverse possession, to the extent of the boundaries in the deed, from the time when A. took possession under the parol gift.

[5.] Where the lessor of the plaintiff in ejectment is dead at the time the action is brought, there can be no recovery upon his demise; where he dies intermediate the bringing and trial of the suit, costs only can be recovered.

[6.] The civil law will presume a person to be living at a hundred years of age; and the common law does not stop much short of this.

Where the plaintiff in ejectment is examined as a witness, and testifies, that inquiry having been instituted by his counsel as to the death of the grantee of the land; he is informed by him and believes that he is dead, and that the action is prosecuted in the name of the grantee, for his benefit alone, this is evidence upon which the jury have a right to find that the grantee is dead; and it is error in the Court not to instruct them accordingly, when requested to do so.

Ejectment, from Baker county. Tried before Judge ALLEN, November Term, 1857.

This was a motion for a new trial.

An action of ejectment was brought by James S. Patillo

against Jacob Watson, to recover a tract of land which had been granted to Joshua Tindal, a revolutionary soldier, in 1831.

Upon the trial, the plaintiffs introduced the following testimony:

The grant from the State of Georgia to Joshua Tindal, (revolutionary soldier,) of Murphey's district, [Washington county, dated the 17th day of October, 1831, for lot of land No. 110, in the 9th district of Early county.

William Griffin, who swore, that the defendant was in possession of the land at the time the action was brought, and that Stephen Merrett settled it in 1846, and remained exercising acts of ownership over and cultivating it, as men who own land usually do, until Watson went into possession under him, (Merrett,) and was in possession of the whole lot, and built houses on the north half. Watson went into the possession of the south half, as purchaser, in 1851, and Patillo told witness that he had purchased the other half from Merrett; lot of land was never divided, but Dry creek ran through it; Baker went into possession under Patillo, and McLaren under Baker, and Bond under McLaren, who was then in possession of the north half of the lot.

The plaintiff then introduced a deed from Humphrey Rowel to Thomas J. Hand, for lot of land No. 110, in the 9th district of Early now Baker, dated the 15th day of August, 1835.

James B. Warren testified, that Merrett told him in 1847 or 1848, that he had written to Hand to purchase the land for him; Merrett built a house on the land in 1845; Benjamin O. Keaton gave Merrett the lot of land in 1842 or 1843; and soon afterwards Merrett entered on the land and exercised acts of ownership over it; never heard Merrett disclaim owning the land; before Merrett settled the lot of land it was known and claimed as Benjamin O. Keaton's.

Plaintiff then closed, and defendant introduced,

James Patillo, the plaintiff, who swore, he believed that

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Joshua Tindal, the drawer of the lot of land, was dead, and that the suit was proceeding for his (Patillo's) benefit alone. Henry Morgan, his attorney, had told him that he had written to Washington county to ascertain the fact, and that the information he received was, that Joshua Tindal was dead. That Merrett told him that he had sold Watson one-half of the lot of land, and that he (Patillo) bought Merrett's claim to the other half, to prevent him from claiming the lot of land which had been levied on under a *fi. fa.* against Thomas J. Hand, which he controlled, and that he gave Merrett \$300 for the same; made a contract with Merrett to purchase the land, and told Merrett that Hand owned it, and Merrett requested him to see Hand and see if he could buy it.

Stephen Merrett swore, that he settled the lot of land in 1844, and exercised acts of ownership over it, and had no doubt but that it was his, until Patillo told him it was Hand's; built upon it and cultivated it till he sold, and put Watson into possession of part of it; Keaton gave him the lot of land in 1843, and told him that Keaton and Howard usually purchased any lot of land that was sold at Sheriff's sale, that did not bring more than the cost; that one was Sheriff and the other Deputy Sheriff; that he owned the land; that he did not remember the number, but that when he found out the number he would give him a deed to it; witness never contracted to sell the lot or one-half of it to Patillo, till he (witness) came to Newton to forbid the sale, when Patillo purchased one-half of the lot for \$300. Witness had before sold the other half to Watson for \$50, and so informed Patillo at the time; Patillo told him that the land was Hand's, and asked him if he would give \$50 for it, and witness said he would, but thought he had the title; witness heard nothing of Patillo or Hand until the levy of the *fi. fa.*

Leonard S. ——— stated, that he had known the lot of land since 1846 or 1847; that Merrett lived on it and cultivated it; told Patillo that Watson purchased one-half before Patillo purchased the other half.

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Defendant then introduced the answers of *Benjamin O. Keaton*, to interrogatories, to the following effect: Knew Watson but not Patillo; purchased a lot of land in the 9th district of Baker county, at Sheriff's sale, number not recollected; on account of kindness and favors extended to him by Stephen Merrett, witness gave the lot of land to Merrett, and at the time, designated the number purchased at the sale; made no title to the land to Merrett, but a quit claim of the same to him; thinks the lot of land was sold at the Sheriff's sale as the property of the drawer; Merrett had stated to witness that he had settled on the lot of land; received no valuable consideration for the land from Merrett.

A deed dated the 9th of July, 1850, from Stephen Merrett to Jacob Watson, for the half of the said lot of land south of the dry creek.

A deed dated the 1st of July, 1850, from Benjamin O. Keaton to Stephen Merrett, for the whole of said lot of land, and closed.

Plaintiff in reply introduced a deed dated 3d of September, 1850, from Stephen Merrett to James S. Patillo, for the half of the said land north of the dry creek.

The evidence being closed, defendant's counsel requested Court to charge the jury, "That if the land was given to Merrett by Keaton at any time in 1844, or at any other time, and no title was made by Keaton at the time of the gift, but if Keaton subsequently made a title in pursuance of and by virtue of said gift, then the paper title so made subsequently by Keaton, related back to the time of the gift." Which charge the Court refused to give, and the defendant excepted.

Defendant's counsel requested the Court to charge, "That the age of Tindal, as disclosed by the grant, (as a revolutionary soldier,) and the evidence of the plaintiff Patillo, are matters for their consideration, and if by these or any other testimony, the jury are convinced that Joshua Tindal is dead,

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the jury cannot find on his demise;" which the Court refused to charge, and defendant's counsel excepted.

Defendant requested, in writing, the Court to charge, "That if the plaintiff Patillo has received information of the death of Tindal, and he believes it to be true, and if the present action is now proceeding for the sole benefit of Patillo, then the information and belief are entitled to much consideration from the jury;" which the Court refused to charge, and the defendant's counsel excepted.

Defendant requested the Court to charge, "That if Merrett went into possession under Keaton, and with expectation of title from Keaton, and took possession under such expectation in 1844 or 1st January, 1845, claiming title to the whole lot, and possession continued in him and Watson for 7 years before action brought, the title would be good in him." This charge the Court refused to give, and defendant's counsel excepted.

The defendant requested the Court to charge the jury, "That if Merrett took possession of the lot of land under the contract with Keaton, and continued the possession, and Keaton afterwards, and while Merrett was in possession, made him a deed under and in fulfilment of said contract, then the deed related back to the time of the original purchase or contract between Keaton and Merrett;" which the Court refused to give, and defendant's counsel excepted.

Defendant requested the Court to charge, "If possession commenced January 1st, 1845, in Merrett, under and by virtue of the gift from Keaton, and in 1850 Keaton made him a title in fulfilment of his promise, then this title enured to Merrett's benefit, and related back to his first possession on the 1st of January, 1845, or whenever he went into the possession under the gift and made his first possession the time from which the statute of limitations commenced to run." The Court refused to give this charge, and defendant excepted.

The jury found for the plaintiff; whereupon, counsel for the defendant moved the Court for a new trial, on the following grounds:

1st. That the jury found contrary to law.

2d. That the jury found contrary to evidence.

3d. That the jury found contrary to the charge of the Court, in this, that the Court charged the jury, "That if they were satisfied by the evidence, that Joshua Tindal was dead at the commencement of the action, that they should find for defendant on his demise."

4th. That the Court erred in its charge to the jury in this: the Court charged the jury, "That the written title by Keaton to Merrett made in 1850, could not relate back to the time of the first possession of Merrett, though the deed was made in pursuance of his engagement to make the title before Merrett went into possession, and though Merrett went into possession upon the faith of his agreement to make the title to him."

5th. Because the Court refused to charge the jury, as requested, "That the age of Tindal as disclosed by the grant, (*"revolutionary soldier,"*) and the evidence of the plaintiff Patillo, are matters for their consideration, and if from these the jury are convinced that Joshua Tindal is dead, then the jury cannot find on his demise."

6th. "That if Patillo has received information of the death of Tindal, and he believes that he is dead from this information, and if this action is now proceeding for the sole benefit of Patillo, then the information and belief are entitled to much consideration from the jury, on the question of the death of Joshua Tindal."

7th. "That if Merrett gave a quit claim to Watson, and expressed to Watson apprehension or fears as to his title, by saying that Patillo told him that Hand had title, which induced him to fear his own, then whatever disclaimer of title founded on the misrepresentation of Patillo, cannot effect Merrett's right to the land."

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8th. "That if Merrett went into possession under Keaton, and with expectation of a title from Keaton, and took possession under such expectation in 1844 or 1st January, 1845, claiming title to the whole lot, and possession continued in him and Watson for 7 years before action brought, the title is good in Merrett and Watson."

9th. "That if Merrett went into the possession, and Keaton afterwards, in fulfilment of his promise, made him a title in 1850, this title enured to his benefit and related back to his first possession in 1844, or 1st January, 1845, or whenever he went into possession under the gift, and made his first possession the time from which the statute, as to the whole land, commenced to run."

The Court refused the new trial on all the grounds taken, and defendant's counsel excepted.

Plaintiff's Exceptions.

Upon the trial, Jacob Watson and Peter J. Strozier, under a notice served upon them, swore that they knew nothing about a deed from Joshua Tindal to Humphrey Rowel to said land.

James Patillo testified, that he believed that there had been in existence a deed from Tindal to Rowel for the land in question; that he had made diligent search for the same and could not find it, and believed it had been destroyed, and that the witnesses were dead.

Plaintiff then proposed to read a record, under the official signature of the Clerk of the Superior Court of Baker county, of a deed dated the 7th of October, 1822, and purporting to be a conveyance with warranty of the lot of land in question, (No. 110,) from Joshua Tindal to Humphrey Rowel.

The defendant objected to this record being read in evidence, it not having been proved that the deed was proved or acknowledged according to law. The Court sustained the objection, and plaintiff excepted.

The plaintiff then proposed to read it simply as evidence of the payment of the consideration money, and as a receipt for the same. The Court overruled the motion, and plaintiff excepted.

Plaintiff then read in evidence, a deed dated 15th September, 1835, from Humphrey Rowel to Thomas J. Hand.

The plaintiff then proposed to read in evidence, a Sheriff's deed dated 3d September, 1850, containing this recital: "Whereas, in obedience to a writ of *feri facias*, issued out of the Superior Court of the county of Muscogee, at the suit of Jeremiah McCoy against Thomas J. Hand, I, James Johnston, &c."

The defendant objected to the reading of the deed, because it was not accompanied by the *feri facias*, under which the sale had been made. The Court sustained the objection, and the plaintiff excepted.

Upon the conclusion of the testimony, counsel for plaintiff requested the Court in writing to charge as follows:

1st. That the defendant, in order to show statutory title must satisfy the jury that he took possession under some color of title, and *bona fide* claimed the land as his own for seven years, and that he held possession of it the full length of that time, continuously, notoriously, and adversely.

2d. That if Keaton purchased the land in dispute at his own sale, while acting as Sheriff, the sale was void, he having no right to purchase at his own sale; and, therefore, any title he may have made to Merrett is void, and will not even amount to a color of title under which a statutory title can be set up.

3d. If Merrett, holding under such a title, had held the possession of the land for 7 years, claiming it as his own, it would not give him a statutory title to it.

4th. If Merrett admitted title in Hand during the time he held possession, he admitted himself tenant under Hand, and the jury must so find, if they believe plaintiff held title through Hand.

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All these charges the Court refused to give, and plaintiff excepted.

STROZIER; and WARREN & WARREN, for defendant below.

H. MORGAN, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The plaintiff tendered in evidence, a certified copy of what purported to be a deed from Joshua Tindal to Humphrey Rowel, dated 7th October, 1832, and recorded the 28th of May, 1836: Joshua Tindal making his mark to the deed, and it purports to have been witnessed by Adam and Williamson, neither of whom attest the instrument officially. Nor is it proven or acknowledged before any body. The Court rejected the copy for any of the purposes for which it was offered—either as an authentic copy of a conveyance executed according to law, or as an ancient paper, or as an acknowledgment of the payment of the purchase money for the land, so as to vest the equitable title in Rowel.

The case of *Winn and others against Patterson*, 5 Peters, 232, and 6 Peters, 663, are relied on to justify the introduction of this paper. But there is a fundamental difference between the proof of the power of attorney in that case, and the deed in this. The power of attorney purported to be signed and sealed in the presence of Abram Jones, J. P., and Thomas Howard, Jr. It was admitted that Jones was a Justice of the Peace at the time, and William Robinson, the D. Clerk who recorded the deed, testified that he knew the hand writing of Abram Jones, and that his signature was genuine.

What evidence is there here, that there ever was an original deed? For aught that appears to the contrary, this deed may have been executed in 1836, at the time it was recorded. It is not officially attested. It is proven by nobody. And to crown all, Tindal signs his mark only.

[2.] The objection to the deed from Johnson to Patillo was well taken; no judgment or *fi. fa.* being shown.

[3.] Counsel for plaintiff requested the Court in writing to charge the jury, that if Merrett admitted title in Hand during the time he held possession of the land, he admitted himself tenant under Hand, and could not dispute Hand's title.

We do not think the proof justified this request. Patillo informed Merrett that Hand owned the land; Merrett replied that he had supposed that he himself was the true owner; but that if the land was Hand's, he would buy it; and he authorized Patillo to give Hand \$50 for the land. Surely this is not attorning to Hand, or acknowledging himself as Hand's tenant.

There are but two questions in the other bill of exceptions which we deem necessary to notice.

[4.] Merrett went into possession of the land in dispute in January, 1845, under the parol gift from Keaton. In 1850, Keaton made him a quit claim deed. Did that relate back to 1845, and take effect from the commencement of Merrett's possession, so as to constitute adverse possession in Merrett to the whole lot?

No authority has been cited to justify this position, and we think it against principle; and consequently hold, that Merrett was restricted to his *possessio pedis*, or actual occupation of the premises, which seems from the proof to have been limited to the north half of the lot, which is not in controversy.

[5.] The other question grows out of the refusal of the Court to charge as requested, as to the manner of proving the death of Tindal, and its effect upon the action. The Judge was requested to instruct the jury, that if Patillo received information as to the death of Tindal, and believed it to be true, and that the case was proceeding for the benefit of Patillo alone, that these facts were entitled to much consideration from the jury. On the contrary, the Judge charged the jury, that they must be satisfied that Tindal was dead *at*

the commencement of the suit, and the fact of his death must be proven by persons acquainted with him.

It is now the law of this Court, as settled by several adjudications, that if the lessor of the plaintiff be dead *at the time of trial*, no recovery can be had on his demise. If he be alive at the commencement of the suit, and die before trial, cost only can be recovered. If dead at the time suit was brought, there can be no recovery in his name of any thing.

As to the mode of proving the death, it is certainly not restricted, as the Court charged, to the acquaintances of the deceased. But without discussing this point, let us direct our attention to the facts in this case, and enquire whether the information and belief of Patillo, as to the death of Tindal, are to be considered as proof against him, and to what extent?

We remark, that the information and belief of a mere witness, would not suffice, and would even be ruled out as incompetent testimony. But Patillo is a party to the action; a lessor of the plaintiff. Does that make a difference?

By a careful examination of all the Acts passed by the Legislature, authorizing a party to be examined at common law, it will be seen that his testimony is treated as the answer of a defendant in equity, to a bill for discovery. In equity, the defendant answers to the best of his knowledge, information, and belief. Information and belief fall short of knowledge, still they are testimony, and a Court of Equity might decree upon such an answer, it being warranted in believing, whatever the party believed to be true against his interest. At any rate, a Court of Chancery would attach importance to such an admission.

Now then, Patillo, declaring as he did, under oath, in this case, that from information obtained through General Morgan, his counsel, upon inquiry instituted in Washington county, the former residence of Joshua Tindal, that he, Patillo, believed that Tindal was dead, the jury were entitled at least to have this testimony fairly submitted to them, under

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a proper charge from the Court, and we think the Court erred in refusing to give it.

[6.] The presumption arising from the extreme old age of Tindal, is not conclusive as to his death. The civil law will presume a person living at a hundred years of age, and the common law does not stop much short of this. 2 *Greenleaf*, § 278 c. and notes; *Best on Presumptions*, 139; *Benson vs. Olive*, 2 *Strange*, 920.

The foregoing points must control this case, and we have neither the time nor the inclination to notice all the changes rung upon them, in the hundred and one requests to charge, embodied in the bill of exceptions. In that "Pandora's Box" of evils, the New Trial Act of February, 1854, the clause most pregnant with mischief, is that which makes it obligatory to grant a re-hearing in all cases where the presiding Judge shall refuse to give a legal charge, in the language requested, when the charge so requested is submitted in writing. This one Act has more than doubled the delay and cost of litigation in Georgia, without possessing one redeeming feature of public benefit.

New trial granted.

GREEN B. BURNEY, administrator, &c., plaintiff in error, vs.
MILTON C. BALL, defendant in error.

[1.] Any amendment of a bill, however trivial and unimportant, authorizes a defendant, though not required to answer, to put in an answer, making an entirely new defence, and even contradicting his former.

Under the Act of 1853, a bill or answer may be amended at any stage of the proceeding in matter of form or substance; and this is the right of the party—the Court prescribing the terms upon which it shall be exercised. The terms, however, must be such as not to amount to a negation of the right.

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- [2.] A witness may not only read his own deposition, it may be read to him in the presence and hearing of the jury to refresh his memory.
- [3.] To constitute a good and valid gift of personal property, there must be a delivery, actual or symbolical or a writing. The acts and declarations of the donor, that he had given the property, are admissible in evidence.
- [4.] Where the time when the contract is to be performed depends on some contingency, it is within the 4th section of the statute of frauds, provided the contingency cannot happen within the year; but if it may happen, it is not within the statute, whether it actually do happen or not.
- [5.] If a father create a trust in favor of his daughter, which is irrevocable, and die, the title having passed out of the father in his lifetime, it cannot be enforced by his legal representative.
- [6.] A charge is erroneous which withdraws from the consideration of the jury, the evidence upon which the party against whom it is given, relies for a recovery.
- [7.] Whether an answer in equity be contradictory and irreconcilable is a question of fact to be determined by the jury. The effect of such an answer is a question of law, to be decided by the Court, and stands upon the same footing as the testimony of a witness, who contradicts himself.
- [8.] The growing practice of multiplying requests to charge, condemned.

In Equity, from Dougherty county. Tried before Judge ALLEN, June Term, 1857.

This was a suit instituted by Green B. Burney, as administrator of Anson Ball, deceased, against Milton C. Ball, to recover certain property of his intestate. The bill alleges that the whole of the property of the intestate had gone into the possession of M. C. Ball, who during the lifetime of his father had managed all his affairs, and that Anson Ball paid little attention to them, but depended entirely on his son M. C. Ball's honesty and integrity. That in the month of March, 1847, the said Anson Ball, having before given Milton C. Ball three negroes, and intending to make up to him the advances which he had made to his other children, executed a deed of gift to him of sixteen negroes, of the value of \$7,000, which with the three already given would amount in value to \$10,000, double what he had advanced to any other child. That it was the intention of the intestate, Anson Ball, and was so understood by Milton C. Ball, that he

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was not to receive all these negroes in his own right, but only the six negroes last mentioned in the deed, and that the other ten were to be held by him in trust, and were intended as a patrimony for the intestate's daughter Ellifair, and that this was fully recognized by M. C. Ball. The bill prayed that defendant might make a discovery of the intestate's property in his hands, and account with complainant for the same.

The defendant by his answer denied that the said Anson Ball died possessed of any real or personal property, with certain exceptions set out in the answer. He admitted that in November, 1847, but not in March, 1847, the said Anson made him a deed of gift of seventeen negroes, but denied that ten or any other number of said negroes were to be held by him in trust for said Anson, or were intended as a patrimony for the said Ellifair Ball, but that the intention of the conveyance was what its face imported, viz: to vest an absolute title to the negroes in defendant.

The complainant amended his bill, and the defendant filed an answer to the bill so amended. The complainant then obtained leave from the Court to amend his bill, by striking out the previous amendment.

In his answer to the complainant's amended bill, the defendant stated various dealings of the said Anson Ball with his property, and that in January 1850, the said Anson Ball delivered to him the balance of his negroes, seven in number, and his mules and other effects, in consideration that he (the defendant) then promised to support and maintain the said Anson Ball, his wife, and daughter Ellifair. That at and previously to that time, the said Ellifair had been afflicted with palsy, and it was not then contemplated by the said Anson Ball or the defendant, that she would ever marry. That he (the said defendant,) then took possession of the property, and that the said Anson Ball disclaimed all control over it, and that he (the said defendant) had in pursuance of the agreement supported the said Anson Ball during his life,

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and also his wife, and also the said Ellifair Ball, until her marriage with Tucker; and that he had made arrangements with the said Ellifair and her husband, to give them property in lieu and discharge of the agreement for her support and maintenance. The defendant admitted that under the advice of William Newsom and in ignorance of the rights of the parties, he took out temporary letters of administration on the estate of the said Anson Ball, but that he took no action under them.

Upon the trial, the complainant's counsel read the bill, answer, and replication.

Defendant's counsel then moved to amend his answer instanter, claiming the same as a matter of right without making any showing, why the matters set forth in his amended answer were not contained in his original answer. To this motion complainant's counsel objected, but the Court overruled the objection and allowed the amendment, and complainant's counsel excepted.

Complainant's counsel introduced as a witness, *William Newsom*, who testified, that at the time of his death, the said Anson, Ball had about forty negroes on his plantation. On the day of the death of Anson Ball, witness had a conversation with Milton C. Ball, who said he regretted that his father had died before he had fixed his property as he wanted it, and said the old man died without a will. Witness told Milton C. Ball that the estate would be subject to administration and advised him to take out temporary letters of administration. Before Anson Ball was buried, witness met Milton Ball and Mr. Tucker, and Milton said he would be fast enough for Burney, that Mr. Whitsett had told them what Anson Ball had said, when he went to get Judge Andrews to write a will, but he was not there, and Milton claimed it was good as a nuncupative will and talked of trying to set it up.

During the examination of this witness, complainant's

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counsel, for the purpose of refreshing his recollection, proposed to read to him his depositions taken in the same cause, he not remembering the fact inquired of, to which defendant's counsel objected. The Court sustained the objection, holding that the question might be asked, but refused to allow the depositions to be read to refresh his memory, and complainant's counsel excepted.

The defendant tendered in evidence the depositions of several witnesses, to prove the declarations of Anson Ball in his lifetime, for the purpose of showing a parol gift of the property in dispute. To the admission of these, complainant's counsel objected.

The Court overruled this objection, and complainants excepted.

The jury found for the defendant, and plaintiff's counsel moved the Court for a new trial, on the following grounds:

1st. Because the Court erred in allowing the defendant after the cause had been opened to the jury, and the bill and original answer had been read to them, to put in a new answer by way of amendment, without making any special showing, why the new matters of defence set up in the amendment were not set up and relied upon in the original answer.

2d. Because the Court erred in refusing to allow complainant's counsel to read over to William Newsom, a witness sworn upon the stand, an answer of his taken in the same case, to refresh his recollection to a material point; the Court holding complainant might ask the witness the question, but refused to allow his said answers to be read to him to refresh his memory.

3d. Because the Court erred in admitting in evidence the declaration of Anson Ball, for the purpose of showing title by parol in Milton C. Ball, complainant's counsel moving the Court to exclude all such declarations.

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4th. Because the Court refused to charge the jury as requested in writing by complainants counsel, that if they believed from the evidence that any parol agreement or contract had been proved between Anson Ball and Milton C. Ball, by which Milton C. Ball was to support and maintain Anson and his wife, and Ellifair his daughter, for their lives, and that in consideration thereof, was to have all of Anson Ball's property; such contract was obnoxious to the 4th section of the statute of frauds, and void; and in charging in lieu thereof, that if such contract had been proven, it was legal, valid and binding, although resting only in parol.

5th. Because the Court erred in refusing to charge the jury, as requested by complainant's counsel, that a trust can be created and proved, in chattels, by parol, and if the jury believe from the evidence, that there were ten or any slaves included in the voluntary deed of the 1st of November, 1847, and that it was understood at the time, that Milton, was to convey them back at any time after to Anson Ball, or any portion of them, so that he might give them to Ellifair, then complainant is entitled to recover that number; and in charging in lieu thereof, that notwithstanding a trust in chattels can be created and proved by parol, yet if there was any such contract or agreement it passed the title out of Anson Ball into M. C. Ball, and the complainant was not entitled to recover that property, for that was a matter between Milton C. Ball and his sister Ellifair.

6th. Because the Court erred in refusing to give in charge the 6th written request of complainant's solicitors as made, to-wit: "That when the statements of a party sometimes claiming and sometimes disclaiming title are in evidence, proof of delivery is essential, and that if the jury believe from the evidence that Anson Ball intended to give all his property outside the several deeds to Milton C. Ball, and Ellifair Ball, and died without consummating that intention, that title to all that property is in the complainant, and he is entitled to recover its value; and that in ascertaining the

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intention of Anson Ball they ought to consider Milton Ball's statements, if made, that he regretted his father's dying before he had fixed the property; Milton's taking out temporary administration; as well as all the statements of Anson Ball claiming and disclaiming the property:" and in lieu of said request, charging the jury that they must look to the whole evidence for the purpose of ascertaining the intention of the donor.

7th. The Court erred in refusing to charge the jury as requested by complainants counsel, "that when an answer is contradictory and in conflict with itself the jury must reconcile it if possible without imputing crime to the defendant, and if irreconcilable they ought not to rely upon it, especially when it is in evidence;" but observed he refused to charge it because the jury were judges of that fact.

8th. Because the Court refused to charge the jury as requested by complainant's solicitors: "That if they believe from the evidence that Milton C. Ball was in possession of the property at the time of the alleged transfer or gift, then in order to have the title perfected in him to the property not included in the deeds, Anson Ball should have had the possession and have redelivered it actually or symbolically to Milton or] have executed a deed;" and in charging in lieu thereof, that when the donee was in possession at the time of the alleged gift, a delivery must be proved, and that the North Carolina case relied on by complainant's counsel was not analogous, for the reason that in that case, the donee came into possession of the property as a loan; that delivery was essential to a parol gift, and that such delivery might be shown by circumstances.

9th. Because the Court erred in charging the jury in conclusion of his charges, the second written request in writing of defendant's solicitors, to-wit: "That if they believed from the evidence, that Anson Ball disclaimed all title in his lifetime to the property in controversy in favor of Milton C. Ball, and at the time of such disclaimer M. C. Ball was in

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possession thereof, exercising acts of ownership and control over said property, the administrator Burney cannot recover ;” and in further charging “that if Anson Ball by his declarations disclaimed property in himself, the jury must find for the defendant.”

10th. That the Court erred in giving in charge to the jury the third written request of defendant’s solicitors, to-wit: “That if any of the property which passed from Anson to Milton C. Ball, now the subject of dispute, had been coupled with a trust for the benefit of Ellifair Ball (now Mrs. Tucker,) that as to such property, the legal estate is in M. C. Ball, and the equitable in Mrs. Tucker, and *that Burney* cannot recover it as a part of the estate of Anson Ball ;” there being nothing in the pleadings or evidence to authorize or justify said charge.

11th. Because the verdict of the jury was contrary to law and evidence.

12th. Because the verdict was contrary to the evidence, and without evidence.

13th. Because the verdict was contrary to the charge of the Court.

The motion for a new trial was overruled by the Court on all the grounds taken, and the complainants counsel excepted.

VASON & DAVIS ; and BAILEY & SCARBOROUGH, for plaintiffs in error.

LYON, WARREN & WARREN, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Was the Court right in allowing the amended answer to be filed in this case? It seems that the original bill had been amended. The case was transferred, by consent of parties, to the appeal docket. The complainant filed an amendment to the bill, April, 1855. At the June Term, 1856, con-

plainant further amended his bill by striking out and withdrawing the first amendment, which the Court held he had a right to do under the Act of 1853-4. The answer to the amended bill, and which is the subject-matter of this exception, was actually filed June 1st, 1856, although not formally offered as an amendment until the case came on to be heard, twelve months thereafter.

We apprehend there can be no doubt of the defendant's right to file this amended answer to the complainant's amended bill. The complainant could compel it. It was the defendant's privilege to file it.

Mr. Daniel says, that "any amendment of a bill, however trivial and unimportant, authorizes the defendant, though not required to answer, to put in an answer, making entirely a new defence; and contradicting his former answer." (1 *Daniel's Ch. Pr.* 468; *Trust and Fire Ins. Co. vs. Jenkins*, 8 *Paige*, 589.) Apart, then, from the Act of 1853-4, the right of the party to make this amendment is indisputable.

[2.] While Mr. Newsom, a witness in behalf of the complainant, was under examination, a question was propounded to him as to some material fact, which not recollecting, counsel for complainant proposed to refresh his memory by reading to him a part of his deposition taken in this case. The Court refused to allow the deposition to be read for this purpose; and this constitutes the second exception upon which error is assigned.

Upon what ground the objection was put by the defendant's solicitor, and sustained by the Court, does not appear. The argument before us concedes that the witness might have been permitted to read his own deposition to refresh his memory; and the rule of evidence is well settled, that he may. (1 *Greenl. on Ev.* 436, and notes.) But it is insisted that it cannot be read to him in the presence and hearing of the jury. Had the objection below been put upon this ground, it might probably, in this particular case, have been obviated by handing the witness his own deposition and permitting him to

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read it. But there are cases where this cannot be done. The witness may be blind, or so illiterate as to be unable to read, and we are not prepared to hold that his memory may not be refreshed by his having his sworn testimony read to him. His interrogatories were sued out, executed and returned under the statute, and but for his accidental attendance on Court, the whole of the depositions would have been read, as evidence to the jury. It is rather a sharp practice, we think, not to allow a portion of such proof to be read to the witness in the presence of the jury to refresh his memory.

[3.] Was the testimony of Douglas, Breedlove, Mrs. Phebe Ball, Dr. Dickerson and others, admissible for the purpose of proving by parol, as it is expressed in the bill of exceptions, a gift of the property in dispute?

This proof relates to the acts and declarations of Anson Ball, as to the gift of the property to his son, Milton Ball. Our opinion is, that the declarations of the donor, that he had given, are always admissible in evidence in cases of this sort. We have heretofore held, and still hold, that they are insufficient of themselves to establish a gift. To constitute a good and valid gift, there must be a delivery, actual or constructive—or as it is termed sometimes, symbolical—or a writing. A delivery may be inferred from the acts of the donor, which go to show that he has parted with the dominion over the property; (10 *Johns. Rep.* 302) as hiring out a slave in the name of the donee; lending money in the donee's name, drawn upon a lottery ticket, upon which the donor wrote the donee's name, declaring that he had given the ticket to the donee. These cases will suffice as an illustration of the rule.

[4.] Was the agreement between Milton C. Ball and Anson, his father, to the effect that in consideration that he, Milton, would support his father, mother and youngest sister, Ellifair, during their lives, that he should have all the residue of his father's slaves and other property, good, under the 4th section of the 29th Charles II, commonly called the statute of frauds? Neither the Courts in England nor in this

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country have concurred as to the proper construction to be put upon this section. It says, no action shall be brought whereby to charge any person, "upon any agreement which is not to be performed, *within* the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party, to be charged therewith, or some other person thereunto by him lawfully authorized."

In 1762, a short time before the English common and statute law took effect under our adopting statute in Georgia, the case of *Fenton vs. Embler's ex'or* (3 *Bur. Rep.* 1278) came before the King's bench in England. The contract was, May, in consideration that the plaintiff would be and become the house-keeper and servant of the said May, and take upon herself the care and management of his family, and perform the said services as *long as it should please the respective parties*, the testator promised to pay wages to the plaintiff, at and after the rate of £6 per year; and also by his last will to bequeath to the defendant, a legacy or annuity of £16 per annum, for and during the term of her natural life.

The declaration alleged performance on the part of the plaintiff, and claimed wages for three years and fifty-nine days. The agreement in parol was admitted, and the only question was, whether it should not have been in writing? A case was cited from the exchequer in 1726, to the effect that a parol promise to be performed, which may or may not happen within the year, after the making, is void within the statute of frauds.

Lord Mansfield said, that this case, from the exchequer, which he thought could not have been rightly reported, was the only one which could make any doubt. That by all the other precedents, it seemed to be well settled, and the other judges concurred.

Such then was the construction put upon this clause of the

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statute, probably in May, 1776. For the case in Burrows was a much stronger case than the one at bar.

The current authority in this country is, that where the time, when the contract to be performed depends on some contingency, it is within the statute, if the contingency cannot happen within the year. But if it may happen, it is not within the statute, whether it actually do happen or not. (2 *Story on Contracts* § 1015, *O. and notes* 1 and 2; *Moore vs. Fox*, 10 *Johns. Rep.* 254; *Bennett vs. Hull*, *Ib.*, 364.)

In the case before us, is full performance on one side, and the contingency may have happened within the year, to-wit: the death of the party to be maintained.

[5.] We think the court was right in ruling, that if a trust had been created in favor of Ellifair Ball, that it was to be enforced at her instance, and not by the administrator of Anson Ball's estate. The title had passed out of Anson Ball in his life time, and was irrevocable.

[6.] We think the Court erred in charging the jury at the request of the defendant's solicitor, that if they believed from the evidence that Anson Ball disclaimed, in his life time, all title to the property in controversy, in favor of Milton C. Ball, and at the time of such disclaimer, Milton C. Ball was in possession thereof, exercising acts of ownership and control over said property, the administrator, Burney, could not recover. And in further charging them, if Anson Ball, by his declarations, disclaimed property in himself, the jury must find for the defendant.

This charge took from the jury the right to consider the entire testimony in favor of the plaintiff. It withheld from them all that was said by Milton C. Ball, at the death of his father. He knew better than any other living person who was the owner of this property. He expressed his regret that his father had died before he "fixed his property." He stated that his father had died without a will, and took out temporary letters of administration, saying he would be fast enough for Burney; (the complainant and his brother-in-law.) That

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Mr. Whitsett had told him what Anson Ball had said when he went to Stakeville to get Judge Andrews to write his will, but that he was not there, and Milton C. Ball claimed that it was good as a nuncupative will, and talked of trying to set it up as such. We repeat that this and all other proof going to show that the father, by the conduct and declarations of the son, had not parted in his life time, with this property, was improperly excluded from the jury by the broad and sweeping charge of the Court.

[7.] As to the refusal of the Court to make the charge, that if the answer of the defendant was contradictory and irreconcilable, one part with another, they ought not to believe it; the Court gave at least an unsatisfactory reason for refusing it, namely, that the jury were the judges of the fact, of whether this be so. Very true; they must determine whether the answer be contradictory and irreconcilable. But the point is, admitting this to be so, what is the rule of law, as to the credence that should be given to such an answer? The principle will be found to be pretty clearly stated in 4 *Phillips on Evidence*, by Cowen & Hill, part II, page 50, note 33; 10 *Johns. R.* 424, and 11 *Wend. Rep.* 240, 252, 253, 343, 348 and 349.

But the repugnance attributed to the answer is not very patent. There is, it is true, more amplification and particularity in the amended answer, but the discrepancy is not very obvious.

[8.] We have intentionally overlooked some of the exceptions in the record, for the simple reason that they are too attenuated and intangible, to amount to anything practical. I regret to see that this is a growing evil in the trial of causes. Instead of asking the great principles of the law, which control the case to be given in charge to the jury, there is a repetition, and a hair-splitting, which are as annoying to a Court as they are unprofitable to the jury. And it is this, amongst other things, which is prolonging to so alarming an extent the terms of this Court. For all these infinitesimal

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nothings are incorporated in the bill of exceptions, and are argued and re-argued here to the great and unnecessary consumption of time that might be much better occupied.

We have examined carefully the case in 2 *Iredell's Law Reports*, (page 361) mainly relied on by counsel for the plaintiff in error, to exclude the acts and declarations of Anson Ball, as to the gift of the property in dispute, to his son. And it is a strong case on his side. We will dismiss it for the present with this single remark, that while we have no fault to find with the judgment of the Court upon the actual case, we feel constrained, by a regard to consistency and every other consideration, to dissent from the great Judge who delivered the opinion in that case, as to some of the doctrines which he maintains, as to the parol gift of slaves.

Judgment reversed.

ROBERT PARKER, et al., plaintiffs in error, vs. JAMES M. CHAMBERS, defendant in error.

- [1.] A witness may be twice examined by the same party, by commission, in the same case.
- [2.] A witness cannot give his opinion or belief by assigning his reasons therefor, in cases where the opinion or belief is not admissible in evidence, without such reasons.
- [3.] Habits of business of a man not admissible to prove, from his conduct, whether the sending of a slave with a married daughter was a gift or a loan: in this particular case, there being no evidence of other similar acts to other children.
- [4.] One of several parties plaintiff may be stricken from the declaration.
- [5.] Remainder-men not present at a purchase of property from tenant for life, are not bound to proceed against the purchaser, nor give him notice, until the accrual of their title.
- [6.] When a legatee for life is in possession of the property bequeathed, at the

death of the testator, and the executor allows him to retain the possession, it is an assent to the legacy, both as to tenant for life and remainder-man.

[7.] A witness who testified to facts which took place when she was very young, after a lapse of fifty-four years, ought to be very consistent to entitle her evidence to full credence.

[8.] A will is admissible in evidence when both parties claim under the testator.

[9.] If, from the facts of the case, the suspicions of a party ought to have been excited, and he makes no enquiry, but proceeds to trial and takes the chances of a verdict, and the witness in the mean time dies, his objection ought not to be heard afterwards.

Trover, and New Trial, from Muscogee county. Before Judge WORRILL, November Term, 1857.

This was an action of trover, brought by Robert Parker, and others, against James M. Chambers, for the recovery of certain negroes named in the declaration.

Upon the trial, the plaintiffs introduced (*inter alia*) the following testimony:

1st. The will of J. Christopher Pritchett, dated the 21st of October, 1807, by the 2d item of which the testator lent unto his daughter, Chloe Parker, during her natural life, one negro woman, Maria, and 4 children, namely, Jim, Dan, Mary, and Aggy, together with her future increase, and at her death, the said Maria and her increase were to be equally divided amongst the children of his said daughter Chloe, lawfully begotten of her body.

To the admission of this will the defendant objected. The Court overruled the objection, and admitted the same as evidence.

2d. The answers of Sally Sullivan to a set of interrogatories, to the following effect: That she thought the negroes in question were loaned to John Parker and Chloe Parker; that she was sent by her mother, at the direction of her father, to tell John and Chloe Parker to send the negroes home. Chloe Parker and herself were half-sisters. In answer to cross interrogatories, the witness stated that John and Chloe Parker were married nearly 54 years ago, and went to housekeeping

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shortly after their marriage; that she thought the negroes were loaned to them shortly after they went to housekeeping; they remained in North Carolina 16 or 17 years after they came into possession of the negroes.

3d. The plaintiffs also read in evidence the answers of Sally Sullivan to a 2d set of interrogatories, to the following purport; That the reasons which induced her belief that the negroes in controversy were loaned by her father, Christopher Pritchett, to Chloe Parker were, that the negroes were permitted to go into the possession of John and Chloe Parker at their marriage, and that she was sent at the instance of her father to John Parker's house, to tell him or Chloe Parker to send the negroes home; that she told either John or Chloe Parker her father's request, and the negroes were sent home immediately, and after staying a short time at her father's, they were sent back again to John Parker's; that her father was a particular man, and required John Parker to send home the negroes every year to stay a short time, and then her father would send them back; never heard John Parker say that her father had a right to control the negroes, but she judged from his acts that he admitted it. Upon one occasion her father took the control by having the negro woman Maria whipped, and said he did it as he did not wish to pay costs, and to this John Parker did not object.

In answer to cross interrogatories the witness stated, that John Parker did not have possession of the negroes till some considerable time after the marriage.

To the admission of the answers to the 2d set of interrogatories, the defendant objected. The Court overruled the objection, and admitted the same in evidence.

During the progress of the trial, the plaintiffs moved to strike out the names of two of the plaintiffs, viz John and Susan Woods. The defendant objected. The Court allowed the names of those plaintiffs to be struck out.

4th. The plaintiffs then introduced as a witness, the defendant, James M. Chambers, who testified, that he had the

negroes (specifying them and their value,) in his possession, and claimed them as his own; that he obtained them from Archibald McCoy; Mary by purchase, Jim under the will of McCoy; all the rest are the descendants of Mary; got the negroes from McCoy about the year 1822; McCoy bought Jim and Mary from John Parker between 1818 and 1822; remembered when they were brought home after the purchase; the Parker family remained in the neighborhood many years after the purchase.

The jury found for the plaintiffs \$13,500, to be discharged by the delivery of the negroes within thirty days; and the farther sum of \$7,500 for hire.

Whereupon, defendant moved for a new trial on the following grounds:

1st. Because the Court erred in refusing to suppress the depositions of Sally Sullivan on her second and last examination.

2d. Because the Court erred in admitting in evidence, (the defendant objecting thereto,) the *opinions* of Sally Sullivan, as disclosed in the brief of evidence.

3d. Because the Court erred in admitting in evidence, (the defendant objecting thereto,) proof by Sally Sullivan, of the general character of her father, as disclosed in the brief of evidence, and in admitting all that portion of the evidence of Sally Sullivan that was objected to by defendant on the trial.

4th. Because the Court erred in permitting the plaintiffs, in the progress of the trial, to strike out the names of John Woods and Susan Woods, and the cause to proceed in the name of the other plaintiffs.

5th. Because the Court erred in charging the jury, that if any of the children of Chloe Parker died before she died, that the right to the whole property, if any, vested in the surviving children of Chloe Parker upon her death.

6th. Because the Court erred in charging the jury, that unless the plaintiffs knew, at the time Chambers purchased the negroes, that they were remainder-men under the will, that

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their subsequent silence or failure to make known their claim, though within their knowledge claimed in fee simple by Chambers, did not operate as a waiver of their right, nor were they thereby estopped from asserting the same.

7th. Because the Court erred in refusing to charge the jury, that they might infer knowledge on the part of the plaintiffs, or any one of them, from their conduct, and the circumstances shown by the evidence.

8th. Because there was no evidence submitted to the jury showing that the executors to the will of Pritchett, if any, ever assented to the legacy of Chloe Parker and her children.

9th. Because the jury found contrary to law and the charge of the Court.

10th. Because the verdict was without evidence, and contrary to the evidence.

11th. Because the verdict was contrary to the weight of evidence.

12th. Because the Court erred in charging the jury, that in order to enable them to find, that the plaintiffs or any one of them, had waived their title to the property in controversy, or were estopped from asserting it, they must be satisfied that such plaintiff was 21 years old at the time of said alleged waiver, or of said alleged estoppel, and had actual and personal knowledge of their right or claim to said property, as contained in said will of Christopher Pritchett; and in charging them further on this point, that it devolved on the defendant to make the proof of these several facts to the satisfaction of the jury.

13th. Because the Court erred in admitting in evidence, the will of Christopher Pritchett, in the absence of evidence that the said testator had such claim, right or title to the negroes in controversy, as authorized the disposition of the same by will or otherwise.

14th. Because of newly discovered evidence since the trial, &c.

In support of the 14th ground, as mentioned, the defendant

made an affidavit to the effect, that since the trial he had discovered new and important evidence, set out in the affidavits of L. Fletcher and Spencer Sullivan, and that if he had known the same at the trial, he would have had those witnesses present in Court, and have moved to suppress the evidence of Sally Sullivan.

Spencer Sullivan's affidavit was to the effect, that he was present in the room when the answers of Sally Sullivan were taken, and that Christopher Parker and Robert Parker were present in the room during a part or the whole of the time.

Wm. L. Fletcher, by his affidavit, stated that he acted as one of the commissioners in taking the answers of Sally Sullivan; that Kitt Parker desired him to act as a commissioner in taking the answers of Sally Sullivan, and that he agreed to do so; that Kitt Parker introduced him to the witness; Kitt Parker and deponent both propounded questions to her, and interrogated her as "to the loan of the negroes;" that he proceeded to write down the answers of the witness, and at the same time Kitt Parker walked out upon the piazza; that while he was taking down the answers of witness, he saw Kitt Parker several times on the piazza, and the witness must have seen him; Kitt Parker was in such a position as to have been able to hear the testimony of the witness; that the witness had displayed in a wonderful degree, her powers of tedious narrative, and that he had, in taking down her evidence, "sifted the chaff from the wheat."

Upon hearing the rule nisi, the Court granted the new trial, and to this decision plaintiffs excepted.

JONES & JONES, for plaintiffs in error.

HOLT & HUTCHINS; HILL; DOUGHERTY; WELLBORN, JOHNSON & SLOAN, for defendant in error.

Judge BENNING having been formerly of counsel in this case, did not preside

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By the Court.—McDONALD, J. delivering the opinion.

The presiding Judge in the Court below granted a new trial in this cause, and his decision granting the new trial is assigned for error.

[1.] Mrs. Sally Sullivan, a witness for the plaintiffs, had answered two sets of interrogatories. The counsel for the defendant moved, at the trial, to rule out the depositions last taken. The Court overruled the motion, and the refusal of the Court to suppress that evidence, is made a ground for a new trial. There can be no legal objection to a second examination of a witness by commission, for the purpose of explaining evidence before given, or of testifying to additional facts.

[2.] The rule in respect to the admission in evidence of the opinion and belief of a witness has been relaxed in some cases, and such testimony has been admitted, provided the witness would assign the reasons for his opinion or belief. This is an unsafe extension of the rule. It ought to be confined to cases of the judgment of experts, and where opinion and belief are the only evidence, or the main evidence on which the issue to be tried depends. Experts in any science or trade may give their opinions on the trial of issues involving questions in respect to a particular science or trade. Subscribing witnesses to a will may testify as to their opinion of the sanity or insanity of the testator, and in similar cases witnesses may testify as to their opinions. But a witness must not give his opinion as to a fact, even though he give his reasons for his opinions. The opinion of the witness ought not to have the slightest influence upon the opinion of the jury, and yet, if the opinion goes before them, it will have an influence with them, imperceptible, perhaps, to themselves. The opinion is not relevant to the issue, if, upon its being submitted to the jury, it ought to have no influence on their finding; and if irrelevant, it is clear it ought not to be admitted as evidence. "A witness when under examination

in chief, must not depose as he *thinks*, or *persuades* himself to believe; he must swear from his *knowledge* of the fact." *McNally's Evidence*, 262. But even if the witness testifies from his *knowledge*, on the cross examination, he may be strictly enquired of, as to his means of knowing the fact sworn to by him. The case cited in the above authority illustrates the propriety of a searching cross examination. The witness swore positively that he knew a thing to be true. On being ~~cross~~ examined, he said he knew it because his father had said so. So a witness whose opinion is legal evidence, may be strictly examined by the other party as to the reasons upon which he formed that opinion, and perhaps this rule for the ascertainment of truth in such cases, has led, incautiously, in some instances, to admit opinions where reasons are assigned for them, when the opinions are not properly admissible with or without the reasons upon which they are founded.

The rule for admitting opinions ought to be "confined to cases in which from the very nature of the subject, facts disconnected from such opinions cannot be so presented to a jury as to enable them to pass upon the question with the requisite knowledge and judgment. *Jefferson Ins. Co. vs. Cothral*, 7 *Wendell's Rep.* 78.

The question in this case was whether the negroes who, at an early day, went into the possession of John Parker and his wife Chloe, were loaned or given to the daughter, Mrs. Parker, by her father, Christopher Pritchett. The witness, Sally Sullivan, testified in her first depositions, that she *thinks* the negroes were given or loaned. From her then present recollection she *thinks* they were loaned. She *thinks* the negroes were given or loaned shortly after they went to house-keeping. They went to housekeeping, she thinks, about four months after they were married. In her depositions last given, she reiterates that to the best of her recollection *and belief*, the negroes were loaned. Some time after the marriage, the negroes were *permitted* to go into the possession of

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John and Chloe Parker, by her father. She does not remember the precise time when the negroes entered into the possession of John Parker. She knows he did not have possession of them until some considerable length of time had elapsed after his marriage. It was at least a year, and may have been several. In both sets of depositions the witness states the facts and circumstances upon which her belief that it was a loan was founded. If a lawyer had been tendered as a witness to give his opinion whether upon these facts and circumstances the negroes had been given or loaned, he could not have been admitted, and why should the witness, whose opinions on that question were certainly less reliable and valuable, be received? The jury were empanelled to find the facts, and the Court to pronounce the law, without the aid of the sworn opinions of the members of the bar, or of less capable witnesses. We think that the opinion and belief of the witness, on that point, ought not to have been admitted.

[3.] The habits of business of Christopher Pritchett were entitled to no consideration, in fixing the nature of the transaction in its origin, which was the subject of enquiry before the jury. There was no evidence of gifts occurring to other children.

[4.] This was an action of trover, and a party plaintiff may be stricken from the declaration in such case. Even in England, where their statutes of amendment are not so liberal as ours, it has been allowed in actions sounding in contract:

The plaintiffs, if they recover, must recover under the will of Christopher Pritchett, and according to the construction of that will, those children only, of Chloe Parker, who survived her, are entitled to recover.

[5.] The plaintiffs were not estopped by any implied waiver of right of property, or acquiescence in the purchase of the negroes by the defendant. To bind them, the waiver or acquiescence must have been such as to have amounted to fraud upon Chambers; such a fraud as, without which, he would not have purchased, or would have rescinded his trade

after his purchase. There is no evidence that any of the remainder-men were present when he purchased. Prudential considerations, if they were apprised of their rights, might well have restrained their action until their title accrued.

The defendant's purchase gave him the title of the tenant for life, and the remainder-men might have considered the property safe in his hands, until the accrual of their title.

[6.] The objection that no evidence was submitted to the jury to prove the assent of the executor to the legacy to Chloe Parker and her children, cannot be sustained. The executor allowed the property to remain in the possession of the tenant for life, and that was an assent to the entire legacy. It was in her possession at the death of the testator, and remained there, with the assent of the executor, of course.

We do not perceive that the verdict of the jury conflicts with any legal principle, or with the charge of the Court.

It is alleged that the verdict of the jury was found without evidence, and contrary to evidence, and contrary to the weight of evidence.

[7.] The principal witness in this case, Mrs. Sullivan, testifies to facts and circumstances which must have transpired, according to her own evidence, about fifty-three or four years before the testimony was given, when she could not have been exceeding six or seven years of age, and she testified at a time when she had become aged herself, being at that time fifty-nine years old; and while we will not pretend to impute to a woman of her unquestionably good character, wilful misrepresentation, or even say that there may not be a memory capable of retaining facts and circumstances occurring at so tender an age, through a long life, yet, we will say, that the testimony of such a witness ought to be perfectly consistent throughout, to show that it proceeds from such a memory. Mrs. Sullivan answered two sets of interrogatories in this case. In the first set she says she thinks the negroes were given or loaned shortly after John and Chloe Parker

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went to housekeeping. They went to housekeeping, she thinks, about four months after they were married. This is an important item in characterizing the transaction as a gift or a loan. In her second answers she deposes, that some time after the marriage, the negroes were permitted by her father to go into possession of John and Chloe Parker; she does not remember the precise time, but she knows Parker did not have possession of them until some considerable length of time had elapsed after his marriage. It was at least a year, and may have been several years. She testifies that Jephtha Parker, the oldest of the children of the fruits of the marriage of John and Chloe Parker, was, at the time of giving her evidence in 1854, about fifty-three years old. This would fix the period of the marriage in the year 1800, or as early as that year. John and Chloe Parker remained in North Carolina sixteen or seventeen years after they came into possession of the negroes. She has been informed that they moved to Putnam county, Georgia, in 1816, and supposes they brought the negroes with them. If this evidence be true, it would fix the loan or gift at about the time of, or shortly after the marriage, and corroborate the first depositions as to the time. We will remark, that while the evidence does not necessarily impeach itself, as to the facts testified to by the witness, it shows how closely the testimony of a witness ought to be scrutinized, who deposes, after so great a lapse of time, to transactions which took place when the witness was of so tender an age, that it would be most extraordinary for any human memory to retain them. We do not, however, say that on this ground alone the Court should grant a new trial, when all these facts and circumstances were before the jury for their judgments to draw their own conclusions.

There is no evidence in this case of any fact or circumstance, that the plaintiffs, or any of them, had practiced a fraud upon the defendant, or waived any right to proceed against him.

[8.] The Court committed no error in admitting in evidence the will of Christopher Pritchett. Both parties claimed under him. The negroes, from the testimony, went from him either as a gift or a loan. If the former, he had no right to will them. If the latter, he had; and the plaintiffs were entitled to recover.

[9.] The defendant moved to amend his motion for a new trial, by adding as a ground, newly discovered evidence. This evidence applied entirely to the taking of the testimony of Mrs. Sullivan, under circumstances of suspicion, supported by the affidavits of the commissioners. We do not hesitate to say that, under ordinary circumstances, we should sustain this ground. But the witness is dead. The testimony cannot be retaken. A set of interrogatories previously taken, in the same case, had been rejected on the ground presented as an objection to Mrs. Sullivan's. That might have excited apprehension or suspicion on the part of the defendant. If he had such strong reason for suspecting unfairness in taking the evidence, he ought to have made enquiry in regard to it before the trial. He was, perhaps, willing to risk a trial with the testimony. Suppose the defendant had known that the testimony was true, and did not object for that reason, after risking a trial, and the witness in the mean time dies, ought he to be allowed to object? It seems, that in a very short time after the trial, he procured this evidence, and it is not explained by what fortuitous circumstance he arrived at the knowledge of its existence. We must not be understood to hold, that if testimony be improperly taken and brought into Court, the death of the witness alone will entitle the party to the use of it. The case must raise no presumption against the other party.

We sustain the Court below, in granting the new trial on the ground on which we have shown that we think the rule should have been made absolute.

Judgment affirmed.

Harrison & McGehee vs. Powell.

HARRISON & McGEHEE, plaintiff in error, vs. **J. S. POWELL**,
defendant in error.

[1.] The Court may withdraw a charge at the instance of the party in whose favor it is made.

[2.] Where there is conflicting and contradictory evidence as to the value or worth of a slave by reason of his unsoundness, and the jury adopt an average as the measure of their verdict, the finding is not illegal on that account.

Covenant in Muscogee Superior Court. Tried before Judge Worrill, at November Term, 1858.

This was an action of covenant brought by **Joseph T. Powell**, against **Harrison & McGehee**, to recover damages for the breach of the covenant of warranty of soundness of a negro sold by defendants to plaintiff.

The facts of the case are fully stated in the opinion of the Court.

The jury found for the plaintiff \$460. 27.

Defendants moved for a new trial upon the following grounds:

1st. Because the Court erred in withdrawing from the jury, upon application of plaintiff's counsel, the charge, that they might, if the evidence authorized it, find for the plaintiff the consideration money with interest: in other words, in allowing the plaintiff to abandon a *recision* of the contract.

2d. Because the verdict was contrary to law.

3d. Because the verdict was contrary to the evidence.

4th. Because the verdict was wholly unauthorized by the evidence.

The Court refused the motion for a new trial and defendants excepted.

HOLT & HUTCHINS, for plaintiffs in error.

WELLBORN, JOHNSON & SLOAN, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

Powell bought of Harrison & McGehee in Oct., 1855, three negro men, for which he paid \$3,100, taking a warranty of soundness. One of the three was Frank, the subject of this suit, valued in the trade at \$1,100, and worth that, no doubt, if sound. Powell, the purchaser being satisfied that the boy was unsound, offered to rescind the contract, and return the negro sometime during the year 1856. The defendants declined taking him back, and this action is brought to recover damages for a breach of the warranty of soundness. There were some fourteen or fifteen witnesses examined altogether, one portion, including the examining physician, proving that the negro was so badly diseased, and chronically so at that, as to render him valueless. The rest, and among them Dr. Billing, testifying that the disease was gleet, which could have been cured for ten or fifteen dollars. He admits however, that if the symptoms as seen upon the examination of Dr. Butt, were true, the disease must have been chronic.

Upon the whole, after a careful examination of the testimony, we may say, that the weight of it, is not strongly and decidedly against the verdict. Indeed, taking the number of witnesses examined and the better opportunity enjoyed and more thorough examination made by the witnesses on the part of Powell, we incline to the opinion, that the strength of the proof is on his side.

[1.] Had the Court the right to withdraw a charge in favor of the plaintiff, as to the law of which he was doubtful, and upon which he was unwilling to risk his case? We think so.

The plaintiff did not put his case upon the Court's view of the law. If the defendant thought it favorable for him, he had a right to request it to be given to the jury at his instance.

[2.] Was the verdict illegal?

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Counsel take it for granted, it was a compromise verdict. Most verdicts and many judgments rendered by Courts upon the law are so. That is the modification of extreme views. *Summum jus*, is rarely administered. There is no reason for supposing that the verdict was the result of lot, and found irrespective of the proof. On the contrary, it is to be inferred, that it was based upon the evidence. Not being able to give entire credence to the opinions on either side, the jury adopted the average, as the measure of damages. And this we repeat, occurs continually, where there is a contrariety of opinion as to the facts. Suppose one witness had sworn in this case, that the disease of the negro depreciated his value one half, another, his full value, and another nothing at all. Here the two extreme opinions are both against the intermediate one, and yet we take it for granted, that because it is the mean it would most likely be adopted. Or, else, the three would be added together and an average taken; and that rule no doubt was applied in this case. With political compromises, I have nothing to do. It has become fashionable to denounce them, whether wise or not, the country is divided in opinion. But this much I will say and affirm, that even the law cannot be administered but upon the principle of concession. And further, that it harmonizes and keeps together families, communities, governments, and the nations of the earth. And that the world is conducted in all its mighty interests upon this principle. Laying no claim to infallibility myself, I have lived long enough to laugh at such pretension in others. Those who are always right, yielding nothing to the conflicting opinions of others, if not the weakest, are certainly not always found among the wisest of their race.

Judgment affirmed.

Martin, adm'r, vs. Gordon.

ABRAHAM MARTIN, adm'r, plaintiff in error, vs. ALEXANDER J. GORDON, defendant in error.

Upon a suit for damages for a breach of warranty, the amount of consideration money recited in the deed, is inquirable into, and neither the grantee nor any subsequent conveyancee, in the absence of fraud, in case of eviction, is entitled to recover more than the price actually paid for the land, with the interest thereon.

A covenant that runs with the land, does so, by virtue of being, as it were, annexed to the land. Therefore, if the covenantor has no title to the land, the covenant cannot run with the land.—BENNING J.

Covenant, from Harris Superior Court. Tried before Judge WORBILL, at October Term, 1857.

This was an action by Abraham Martin, administrator of his deceased wife, Sarah Martin, formerly Wardlaw, against Alexander J. Gordon, to recover damages for breach of a covenant of warranty of title to a lot of land.

It appeared that defendant sold and conveyed the land to one John Fife, and the price or consideration, as contained and recited in his deed, was 500 dollars. That Fife, in consideration of 1000 dollars, as recited in his deed, sold and conveyed the premises to Sarah Wardlaw, afterwards wife of plaintiff. There was the usual covenants of warranty in both deeds, and proof of an eviction by title paramount.

Upon the trial defendant offered to prove that the sum paid for said land to him by Fife was but 100 dollars, and not 500 as stated in the deed.

Plaintiff objected to the testimony as inadmissible against a *bona fide* purchaser for value without notice.

The Court overruled the objection and admitted the evidence, and plaintiff excepted.

Defendant then proved that Fife only paid 100 dollars for the land, and executed to Gordon his bond to indemnify him against loss or damage on account of his warranty.

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The deed from Gordon to Fife was dated 26th August, 1837, and from Fife to Sarah Wardlaw, 28th Sept., 1838.

The testimony being closed, plaintiff requested the Court to charge the jury, that if Gordon received 100 dollars in money for the land, and also Fife's bond of indemnity, and executed his deed of warranty for 500 dollars, that the plaintiff was entitled to recover the 500 dollars and interest, and the defendant must rely upon his bond of indemnity against Fife.

The Court refused so to charge, but held and charged that plaintiff could only recover the one hundred dollars and interest. To which charge and refusal to charge, plaintiff excepted.

The jury found for the plaintiff two hundred and sixty dollars and cost of suit.

Whereupon counsel for plaintiff tenders his bill of exceptions.

B. H. HILL, for plaintiff in error.

D. P. HILL, for defendant in error.

By the Court—LUMPKIN J., delivering the opinion.

In *Harwell and another vs. Fitts*, (20 Ga. Rep. 723,) this Court held that the recital in a deed, as to the consideration money, was inquirable into in a Court of law, as between the original parties. Indeed this proposition is not disputed by counsel for the plaintiff in error.

This being so, how is the subsequent conveyancee entitled to any greater privileges than Fife, the immediate feoffee of Gordon? The plaintiff can derive no benefit from the bond of indemnity taken by Gordon, for his own security. Gordon sold the land for an inconsiderable sum, owing, no doubt, to the defect in the title, and took the bond of his vendee to save him harmless. This bond can in no wise inure to the benefit of the plaintiff's intestate.

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The result of a careful examination of the authority establishes that subsequent purchasers are affected by the equities between previous parties. If A sells land to B, with covenant of warranty, and B releases A and sells to C, who is evicted by paramount title, A is nevertheless discharged, and damages cannot be recovered against A by C upon A's warranty to B. If Fife could only recover one hundred dollars with interest from Gordon, that being the price actually paid by him for the land, the administrator of Mrs. Martin, formerly Mrs. Wardlaw, can recover no more.

Actual fraud is not pretended in this case. It does not go upon that idea. The truth is, Fife, the only person to whom Mrs. Martin looked for damages, is insolvent. She may never have seen the deed from Gordon to Fife. 'Could it be made to appear, either at law or in equity, that Gordon and Fife combined to cheat Mrs. Martin, the result would have been different. The facts upon the record warrant no such conclusion.

The plaintiff must be content then to recover the actual price paid for the land, with interest thereon, and no more: that being the measure of damages for the breach of Gordon's warranty of title.

Judgment affirmed.

BENNING J. concurring.

Gordon sold and made a warranty to Fife, and Fife sold and made a warranty to Mrs. Martin. Gordon had no title to the land. Did the warranty pass to Mrs. Wardlaw?

"In the early case of *Noke vs. Awder* (Cro. Eliz. 417,) John King had made a lease for years to Awder, the defendant, who conveyed it to one Abel, and covenanted that he and his assigns should peaceably enjoy it without interruption. From Abel the lease came by assignment to the plaintiff, who, being ousted by one Robert King, brought an action upon the covenant. The case was on the point of being adjudged for

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the plaintiff, when Sir E. Coke, who was counsel for the defendant, raised this dilemma: in order to entitle the plaintiff to recover he must show that he was ousted by a lawful and paramount title, it being well settled that the covenant is not broken by a mere tortious entry of a stranger; and if he show the eviction to be under paramount title, then nothing passed from the covenantor but a lease by estoppel, and as no estate passed, the subsequent assignee, who took nothing, of course, lost the benefit of the covenant, which could only pass as an incident to the estate; this argument was successful, and the judgment for the plaintiff arrested." *Rawle Cov. Title*, 389.

This case has been repeatedly followed by the English Courts down to this day. *Andrew vs. Pearce*, 4 *Bas. & Pul.* 162; *Whittin vs. Peacock*, 2 *Bingham N. C.* 411; *Pargela vs. Harris*, 7 *C. B.*, 708; *Green vs. James*, 6 *Mees. & W.* 656; *Webb vs. Russell*, 3 *Term R.* 393.

It has not been followed by the Courts of New York, or those of Massachusetts, or those of some of the other States of the United States; but those Courts, if one may judge from the face of their decisions, seem rather to make the law yield to the case, than the case to the law. *Rawle Cov.* 394, *et seq.* The power to do this, is not given to any Court of this State.

The English cases, I think, speak the law of Georgia.

If they do, then the plaintiff got more in the judge's charge than he was entitled to. Gordon having no title when he made the warranty to Fife, the warranty did not pass from Fife to his assignee, Mrs. Wardlaw; and, consequently, a right of action on it never vested in her, and Martin, her subsequent husband, could not be entitled to recover anything from Gordon, yet, the Court told the jury, that they might find as much as one hundred dollars for him.

Again, I am very much inclined to think that the bond given by Fife to Gordon, operated as a *release* of Gordon from his covenant. This bond was made before Mrs. Wardlaw purchased. If the bond had been a release, it would, according to *Middlemore vs. Goodale* (*Cro. Car.* 503,) have extin-

guished the covenant, and therefore, would have prevented it from passing to Mrs. Wardlaw; and this, whether she purchased, with or without notice of such release. Being extinguished, it would be no longer annexed to the land, and therefore, could not pass with the land. But I reserve my opinion as to the effect of this bond on Gordon's liability to Fife's assignee. *Suydam vs. Jones*, 10 Wend. 180.

MCDONALD J. dissenting.

The judgment of the Court below is affirmed by a majority of this Court. I dissent from the judgment of affirmance.

The plaintiff's intestate purchased of John Fife a tract of land and took his deed warranting the title. John Fife purchased of Alexander J. Gordon, the defendant, and the consideration expressed in the deed was five hundred dollars. The defendant's intestate was sued for the land and evicted. The defendant was notified of the suit and called on to defend. The present suit is against Alexander J. Gordon, as a remote warrantor. The plaintiff on the trial offered and read in evidence the above named deeds, which contained the usual clauses of warranty of title. He read in evidence also, the record of the suit against his intestate for the money of the land, and the notice to defendant, and closed his cause.

The defendant then proposed to prove by Benjamin F. McDaniel, that though the deed from Gordon to Fife recited that the consideration which he paid for the land was five hundred dollars, yet in truth it was only one hundred dollars. The plaintiff objected to the testimony as inadmissible against a *bona fide* purchaser without notice. The Court admitted the evidence and the plaintiff excepted.

A covenant of warranty runs with the land, and though the words "and assigns" be omitted in the warranty the remote grantee may sue in his own name. *Leary vs. Durham*, 4 Ga. 603; *Redwin vs. Brown et al.*, 6 Ga. Rep. 317, 318. The plaintiff's intestate was the assignee, therefore, of the

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contract or covenant of warranty made by Morgan to Fife, and had a right to look to the entire deed to ascertain the extent of her rights and remedies on that covenant, if it should become necessary to resort to it. Knowing that she had a right to look to that as security, in the event of the failure of the title and the insolvency of her immediate grantor and warrantor, the grantor ought to be held bound by his admissions and covenants therein. No sound or commendable reason is apparent why a greater consideration should be expressed in the deed than was in fact received. It certainly could be of no advantage to the grantor, who, should his title fail, is bound to respond at least for the consideration money and four years interest, the period which bars an action for *mesne* profits. If the consideration was put in for a larger amount than he actually received, to answer the immoral purposes of a speculator, who wished to exaggerate the cost of the land, to extort a higher price from an unsuspecting and honest purchaser, the grantor ought not to be allowed to retract his written declaration, perhaps made and certainly used for such a purpose, when he is called on to respond to the defrauded purchaser.

Down to the period of our revolution and long after, the rule of evidence of the English Courts admitted no evidence to add to, vary or contradict the terms of a deed, 1 *Phillips Evidence*, 548. This rule extends to the consideration. *Baker vs. Dewey*, 1 *Barnwell & Cresbull*, 704. The case of *The King vs. The Inhabitants of Scammenden*, 3 *Tenn. Rep.* 474, is an authority for the contrary doctrine. But the authorities referred to by Lord Kenyon, do not support him, and that case has not been followed in England. The American authorities have relaxed the rule if not destroyed it, and seem to admit very liberally, evidence of additional consideration of the sort expressed in the deed, or what consideration was paid, when the deed states that there was a consideration, but does not express what it was, &c. But this is not done when it

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would prejudice a *bona fide* purchaser without notice. *Duwall vs. Bibb*, 4 *Herring & Mun. Rep.* 113.

When the witness McDaniel was sworn, he testified, that Fife paid Gordon one hundred dollars only for the land, and it was understood at the time, that there was a dispute about the title, and Fife executed to Gordon his bond for \$500, to indemnify him against loss for putting the consideration of \$500 in the deed. This is the manifest understanding of the case from the imperfect record before us. When the case was closed, the counsel for the plaintiff requested the Court, in writing, to charge the jury that if Gordon received \$100 in money for the land, and Fife's bond of indemnity against loss on account of his warranty, and for this reason executed his deed and warranty for \$500, the plaintiff was entitled to recover the \$500 and that the defendant must rely on his indemnity bond against Fife. The Court refused to give this charge, and counsel for plaintiff excepted.

I think the charge ought to have been given. Upon the face of Gordon's contract or covenant he was liable at law for the \$500, and at least four years interest. If he can be relieved either in a Court of Law or Chancery, from liability to that extent, it must be by reason of some fact or circumstance which entitles him in equity to reduce its amount; and Courts have allowed evidence simply of the amount of the consideration actually received by him, if less than that expressed in his deed, to be given in evidence, and to have the effect of fixing the measure of his vendee's redress. This is regarded as an equity in his favor. But if the amount of consideration specified in the deed, be inserted for a sinister object, as to entrap a purchaser into confidence in a bad title, what becomes of the equity? In this case the title was disputed, and the result shows that it was no title. The consideration of \$500, four hundred dollars more than the price received for the land, was deliberately and by contract inserted in the deed, and the defendant knowing the immorality of the act, took care to require a bond to indemnify him against

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the legal effect. I think the Court ought to have given the charge, as requested, and that it ought not to have allowed the defendant to avail himself of a rule, of at least doubtful propriety, established to shield him from injustice, to inflict wrong and injury upon another.

RANDOLPH L. MOTT, plaintiff in error, vs. PAUL J. SEMMES, garnishee, defendant in error.

A. was indebted, by stock note, to the M. & M. Bank of Columbus. By contract with B., the stock was transferred from A. to B., and A's note delivered up to him by the Cashier of the bank, upon the verbal undertaking of B., to pay the amount of the subscription to the bank. The bank subsequently ratified this transaction, B. having been elected a director upon the faith of this stock.

Held, That A. could not be made chargeable, as a debtor to the bank, upon a liability incurred by the bank some years thereafter; and if responsible at all, it could only be in equity, for fraudulently abstracting the assets of the corporation.

Garnishment, from Muscogee county. Decided by Judge WORRILL, November Term, 1857.

An action of trover was brought by the plaintiff in error against the Manufactures and Mechanics Bank of Columbus, to recover deposits he had made with the bank. Upon this action the plaintiff obtained a judgment in his favor, against the bank, and upon this judgment a summons of garnishment was issued against the defendant in error, as garnishee of the bank.

Upon the hearing of this summons, the plaintiff introduced (among others,) *E. S. Greenwood*, who testified, that he was a director of the bank in 1853 and 1854; and that when he went into the board of directors, there was a change of offi-

cers—the original ones having sold out or transferred their stock. Plaintiff's counsel asked what amount the purchasers paid for the stock. The defendant's counsel objected to the witness answering this question. The Court sustained the objection, and plaintiff's counsel excepted.

Plaintiff's counsel offered in evidence an instrument, (of which they proved the execution, and stated their readiness to show the authority of Grimes, the attorney, to execute it,) purporting to be an agreement for the transfer of 2,440 shares in the bank from Thornton and Kyle, two of the stockholders, executed by Grimes, their attorney, for \$2,000, to J. T. Foster and D. K. Colburn, for which they were to make and endorse a promissory note for the amount, at 30 days from November 5th, 1853, and it was thereby agreed that the transfer and promissory note were to be deposited in the hands of Wm. Patrick, to be delivered up to Foster and Colburn, on their paying the said promissory notes at their maturity, otherwise, they should be returned to Thornton and Kyle, and the agreement for sale and transfer to be void.

Defendant's counsel objected to the introduction of this instrument. The Court sustained the objection, and plaintiff's counsel excepted.

The plaintiff's counsel offered in evidence the minute book of the directors of the bank. From the entries in this book, it appeared that Semmes became a subscriber for 1,500 shares in the bank, on the 5th of April, 1852. There was also an entry stating that \$25,000 had been paid into the bank by Semmes and other subscribers, as a payment of 10 per cent on their shares, according to the charter. That on May the 8th, 1852, a meeting was held for the election of a President and Directors of the bank, when Semmes was elected President, and Kyle elected Cashier. It was then ordered that certificates of stock should be issued to the stockholders, and upon motion of one of the directors, D. Thornton, it was ordered, that the notes of the stockholders for the amount of

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their subscriptions actually paid in, should be discounted, the notes to be payable 30 days after demand by the President.

Three transfers of shares were in evidence. One dated the 8th of May, 1852, for 550 shares in the bank, from Semmes to D. Thornton. The 2d dated the 12th of July, 1853, for 950 shares in the bank, from Semmes to Smith, and the 3d dated the 11th day of October, 1853, for 950 shares in the bank, from Smith to Kyle.

At a meeting of the directors of the bank, on the 12th July, 1853, Semmes resigned his office as President, which resignation was received, and Smith appointed his successor.

Robert Kyle, introduced as a witness by the defendant, testified, that he was the first Cashier of the bank, and continued as such till sometime in 1853; that he was Cashier when the notes were given for the capital stock paid in, as authorized by the order in the minute book. That Semmes only gave his note for \$9,500, as he had transferred 450 of his shares to Thornton. Kept the note of Semmes till he transferred his 950 shares to Smith, which was done in the presence of witness, who, as Cashier, took from Smith his recognizance or verbal promise to pay the \$9,500; gave up to Semmes his note; that the transaction was known to all the officers of the bank, and approved by them. That at the date of the transfer of the stock from Semmes to Smith, the latter, in consideration of the stock, assumed the debt of Semmes to the bank; that the bank accepted Smith's promise to pay, in lieu of the note of Semmes, and that he (witness) then delivered the note to Semmes, who then ceased to have any connection with the bank, or to owe it anything.

After the argument of counsel, the Court charged the jury as follows:

"It is conceded that the garnishee was one of the original stockholders in this bank, and subscribed for 1,500 shares of its stock, and subsequently, transferred 450 of his shares to D. Thornton, and that he paid in 10 per cent. upon the

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amount of his subscription, and that in pursuance of an order of the directors of the bank, the money thus paid into the bank by Semmes was returned to him, and his promissory note amounting to \$9,500, taken for the same, to be paid in 30 days after demand by the President of the bank. And now the question for you to determine is, whether Semmes is still indebted to the bank upon that note, or whether he has paid it off. The plaintiff insists that he is still indebted to the bank upon that note, and the garnishee that he has paid it. This, you perceive, is the question upon which the parties are mainly at issue. Now if, from the evidence, you should believe after this, that Semmes transferred the balance of his stock to H. S. Smith, and thereupon Smith promised the bank to pay this indebtedness of Semmes, and the bank then delivered the note to Semmes, and took Smith's verbal promise to pay it, in lieu of the note, then the debt is satisfied, the note is cancelled, and you will find the issue for the garnishee, otherwise, you will find for the plaintiff;" and if they found for the plaintiff, the Court gave the jury directions as to the form of their verdict.

Plaintiff's counsel requested the Court to give the jury the following charges:

"That if they believed from the evidence that the sum of \$25,000, or any other sum, was actually paid to the commissioner by the persons subscribing for stock in the Manufacturers and Mechanics Bank of Columbus, and it was so paid as capital stock, and that the same was afterwards paid over by said commissioners, to the directors of said bank, that the money so paid became the property of said bank."

"That if the jury should believe from the evidence that the directors, after the money was so paid to them, permitted or authorized the stockholders to give their notes in lieu of the money so paid in, and receive the same back, no matter under what color or pretence done, and this was done to evade or get round the provisions of the charter requiring \$25,000

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in specie, or bills of specie paying banks, such arrangement and transaction is void; and if you should believe that the garnishee was a director at the time, or a party to that arrangement, and under it received back the amount paid in by him or any portion of it, the money so received by him is still the property of the bank."

"That if they should be of the opinion from the evidence, that the transaction of returning to the stockholders the money paid by them, by discounting their notes for the amount, was not to evade the provisions of the charter, and was done in good faith, and that the garnishee gave his note for the amount of the money paid in by him under that arrangement, then the note became the property of the bank, and the garnishee its debtor, and that the Cashier had no authority to give up that note to the garnishee upon the verbal promise of Smith or any other person to pay the bank the amount; and if they believe from the evidence that it was so given up to the garnishee, without any order of the board of directors, or their assent thereto, acting in the capacity of directors, that that transaction is void, and that Semmes still owes the bank the amount, unless paid in some other way."

"That if they believed from the evidence that the directors, on receiving the \$25,000 from the commissioners, returned the same to the stockholders and received their notes in lieu thereof, with the view to make them the capital stock, and that these notes so received have never been paid in specie, or the bills of specie paying banks, that such an arrangement is an evasion of the charter of the bank, and void, and the persons so taking back the money so paid, are indebted to the amount so received, unless paid or discharged in some other way."

"That if the jury believed from the evidence that the directors, on receiving the \$25,000 from the commissioners, returned the same to the stockholders, or permitted them to receive back the money paid in, and placed in the bank their notes in lieu thereof, with a view to make the notes so given the cap-

ital stock so paid in, or to represent it, that would be an evasion of the charter, illegal and void, and the money so received is still the property of the bank."

"The Cashier of a bank has the implied power to negotiate the securities and manage the funds of the bank, but he has no right to discount notes, or to deliver up the capital of the bank to any original stockholder, on the promise of a third party to pay the same : there is no such power implied by virtue of his office as Cashier."

"Neither the Cashier of the Manufacturers and Mechanics Bank, nor its board of directors, had the right to substitute the notes of the directors for the specie capital paid in. Directors loaning to themselves the capital, payable 30 days after the demand of the President, is not a discount of notes, but is a substitution of the notes of the directors for the specie capital paid in, and such substitution is illegal."

The Court refused to give all these charges as requested, except the first; and to this refusal of the Court to charge as requested, and to the charges so given by the Court, except the first requested charge, plaintiff's counsel excepted.

By the Court.—LUMPKIN J., delivering the opinion.

We are quite clear, that whether Semmes can be made liable to creditors of the bank in another proceeding or not, he cannot by process of garnishment. The record shows, that he transferred his stock to Smith—Smith agreeing to pay the amount due thereon to the bank. And thereupon, the Cashier surrendered up to Semmes his note. No attempt has ever been made by the bank, to charge him as a debtor to the bank, or to hold him responsible in any way, upon his original subscription for stock.

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It is conceded, that if this substitution of liability had been made by the bank, it would have discharged Semmes. It was done by the Cashier; and we are authorized to assume that the act was ratified by the bank. We infer this, not only from its acquiescence, but from the further fact, that upon the faith of this transaction—constituting Smith a stockholder in the place of Semmes—he was made a director of the bank, which he could not be unless a stockholder, and he was no stockholder, unless this contract or arrangement between the Cashier, Semmes and himself made him one.

This is not all. This very stock was subsequently transferred by Smith, for no other or further assignment of the stock was ever made by Semmes. So that those who controlled the bank, at the time Mott, the plaintiff, made his deposit—to recover which this suit is brought—must necessarily have derived their right and authority through Smith, and upon the faith of this transfer by Semmes. So that the proof, as to the ratification of this act, on the part of the bank, is conclusive.

In *Phillips vs. Wesson et al.*, 16 Ga. Rep. 137, this Court say, “But there is a technical difficulty which cannot be well overcome, as to this remedy by garnishment. Admitting all the facts charged in the bill to be true, Phillips, perhaps, could safely swear, that he owed Stephens nothing, and that he had nothing of his in his hands. For, this being a fraudulent arrangement between them to defeat the creditors, Phillips is not liable to account to Stephens, although he may be to the creditors. And notwithstanding the transfer by Stephens may be a nullity, as to his creditors, still, it will be perceived, that the process of garnishment does not make and meet the issue fairly. At any rate, this legal remedy is not complete. Phillips may swear, in answer to the garnishment, that he owed Stephens nothing; yet, if he admitted the facts charged in the bill, he would subject himself, undoubtedly, not to a prosecution for perjury on his former oath, but to a

decree in favor of the creditors of Stephens, to account for the goods or their value."

If the Court reasoned rightly, in respect to a case confessedly fraudulent, what ought to be its opinion in the case before us, where not a debt had been contracted by the bank, when Semmes' note was delivered up to be cancelled. And when Mott's debt had no existence for years afterwards. And especially when it appears, that Semmes had washed his hands of this charter, long before it went into the possession of its foreign purchasers. Perhaps for the very reason that he would not lend his sanction to such a transfer.

Let the creditors then go into equity, and, if they can, subject Semmes for aiding and abetting in the fraudulent abstraction of the effects of this bank. But he cannot be reached by process of garnishment, if he has been discharged by the bank. The witness, Kyle, swears positively that the money was paid to the bank upon this transferred stock. I put no stress upon this proof in this opinion.

Judgment affirmed.

BENNING J. concurring.

On the day of the organization of the bank, the directors made an order in these words: "Ordered, that the note of the stockholders for the amount of their several subscriptions paid in, be discounted; the notes to be payable, thirty days after demand by the President of the bank."

This order was immediately carried out. The amount coming to Semmes was \$9,500, for which he gave his note. This was on the 8th of May, 1852.

This transaction was void, or it was valid. It must have been the one or the other. If the purport was merely to let the stockholders have the use of the money, until the bank commenced business, and not to let the bank commence business, until the money was returned, the transaction was not forbidden by any law with which, I am acquainted. It

certainly was one that could affect none but the parties to it. To show that this was the purpose, it might be, perhaps, that nothing ought to be deemed sufficient short of proof, that the bank did not commence business until the money was returned, *i. e.*, until the notes were paid. This, however, is a point which I do not think requires decision.

Be this then, as it may, the transaction was void, or it was valid. That is certain.

If it was void, the effect was, that the stockholders, for the sums respectively received by them, became respectively indebted to the bank *in spite* of the transaction; if it was valid, the same thing happened *by virtue* of the transaction. Either way, the effect was precisely the same, viz: that the stockholders respectively became indebted to the bank, in the sums which they respectively received from the bank. In the case of Semmes, this sum was \$9,500; for which he gave his note.

Being thus indebted to the bank, their debts stood like any other debts due to the bank; that is they stood subject to be paid or extinguished, in the same way as other debts due to the bank, were subject to be paid or extinguished.

Afterwards, on the 12th of July, 1853, Semmes, and H. S. Smith, and Kyle, the Cashier of the bank, made this arrangement, viz: that Semmes should transfer his stock to Smith, and Smith should pay the bank for the stock, and the bank should surrender to Semmes his note.

Accordingly, on the same day, Semmes transferred his stock to Smith, and Smith verbally promised Kyle to pay the bank for it, and Kyle surrendered to Semmes his note.

Afterwards, but long before the existence of the summons of garnishment, Kyle, acting for Smith, paid the bank the said amount that Smith had promised to pay the bank, for the stock which he had got from Semmes.

Now, did all this amount to an extinguishment of Semmes' indebtedness to the bank.

The plaintiff in error says no. He says that Kyle had no original *authority*, as cashier, to make this arrangement, and that the arrangement was never ratified by the board of directors.

But is this all true? I think not.

First. The arrangement was made as above stated, on the 12th of July, 1853, a part of it being the transfer by Semmes of his stock to Smith. This transfer had to be upon the books of the bank. Therefore, it was made, probably, in the bank; especially, is this to be said, as Kyle, the cashier, was a party to the arrangement. On that same day, the directors had a meeting, for on that day, they elected *Smith a director in Semmes' place*; and on that day, Semmes resigned his office of president. Now is it not clear beyond a reasonable doubt that all these things occurred at the same time and place. I think so. If they did, then it follows, that this arrangement of Kyle's with Semmes and Smith, was made in the banking house, and under the very eyes of the directors whilst in session.

At all events, the board's electing Smith a director, shows, that they ratified this arrangement, for, to be eligible as a director, he had to be a stockholder, and it was only through this arrangement, that he could have been a stockholder. In making him a director, they must, therefore, have sanctioned the arrangement.

Secondly Kyle says that he paid the bank for Smith, what Smith, according to the arrangement, was to pay the bank.

In receiving such pay, the bank had, of course, to sanction the arrangement.

I think it clear, then, beyond a reasonable doubt, that the arrangement was, if not authorized, at least ratified, by the bank.

And what is there in such an arrangement, that creditors of the bank, even if they were creditors contemporaneous, and, not long subsequent, could justly complain of? The bank thus squandered none of its assets. If it gave up to

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Semmes, \$9,500, it got back in place of it \$9,500 from Smith. Even if it gave up \$9,500 to Semmes, in exchange for a debt of that amount on him, and then gave up that debt to Smith, for a like debt on him, what is there in it? Smith, for ought that appears, is as solvent as Semmes. The creditors of the bank are certainly, not entitled to have \$9,500, twice, once from Smith, and once from Semmes.

These things being so, there is nothing in the charge, or the refusal to charge, to call for a new trial, so far as I can see.

Hence, I think that one ought not to be granted.

McDONALD J., dissenting.

The plaintiff in error sued and obtained judgment, against the Manufacturers and Mechanics Bank of Columbus, in the Superior Court of Muscogee county. During the pendency of the action a summons of garnishment was sued out by the plaintiff in error, in the usual form, requiring the defendant in error to appear and answer what he was indebted to the defendant in the pending action, &c. He appeared and deposed that he owed the defendant nothing &c. The plaintiff in error traversed the garnishee's affidavit and on that issue the parties went to trial. It appeared in evidence that the commissioners appointed in the act of incorporation to receive subscriptions of stock, gave public notice that at a specified time and place they would open bonds for subscription of the capital stock of said Bank.

The garnishee in this case subscribed fifteen hundred shares. The stock was all taken, and the commissioners certify that ten per cent. of the capital stock was paid to them, being twenty-five thousands dollars. Reciting these facts in their advertisement, they published a notice to the stock holders to meet on the 8th day of May ensuing, (1852) at the counting room of Grimes, Kyle & Thornton to elect five directors. The stockholders met agreeably to said notice. They

electd their directors who proceeded, on the same day, to organize, by the election of a President and Cashier. The commissioners for receiving the subscription and the 10 per cent. of the capital stock subscribed, paid to the directors the twenty-five thousand dollars. The defendant in error on the same day, transferred to Dozier Thornton four hundred and fifty shares of the stock subscribed by him, the directors having previously passed an order that certificates of stock be issued to the stockholders for the amount of stock which they had respectively subscribed. On the same day, the 8th of May 1852, the board of directors passed an order, that the notes of the stockholders for the amount of their several subscriptions, actually paid in, be discounted, the notes to be payable thirty days after demand by the President of the bank. On the sixth of December 1852 an election was held for directors and the same persons were elected, and the defendant in error was re-elected President of the bank. Robert Kyle testified that on the 12th day of July 1853 the defendant in error transferred the remaining part of his stock to H. S. Smith, and on the same day resigned his offices of director and President, and in his stead H. S. Smith was elected director and Sterling F. Grimes was elected President. He was the first Cashier of the bank and held the office until the latter part of the year 1852. He was cashier when the notes of the directors were discounted. The note of the defendant in error was discounted for the sum of nine thousand five hundred dollars. After defendant in error transferred his stock to Smith, Kyle, acting on his own responsibility as cashier, gave up to the defendant in error his note for \$9,500. This transaction was known to every officer of the bank, and assented to by them, but was never acted on at any regular meeting of the board.

At the time of the transfer of the stock by Semmes, the defendant in error, to Smith, Smith purchased said stock of Semmes and assumed the debt of Semmes to the bank to the amount of \$9,500. He further testified that the bank accept-

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ed Smith's promise to pay, in lieu of Semmes' note, whereupon he as cashier delivered up to Semmes, his note, who ceased to have any connection with the bank and owed it nothing. This witness having testified that he, as cashier took Mr. Smith's "recognizance" for the \$9,500, was asked on the cross examination what he meant by taking Mr. Smith's recognizance and answered that he took Mr. Smith's verbal promise to pay that amount and on that he gave up to Mr. Semmes his note of \$9,500. He further testified that Smith never paid said sum, nor any part of it, as far as he knew, but that he had paid it for him.

Elbridge S. Greenwood testified, that he was a director of the bank from about the 5th of December 1853 to the 3d of July 1854. When he went into the board there was a change of officers, the original owners of the bank having sold out and transferred their stock. The bank had done no business of any kind nor contracted debts, so far as he knew, and it did no business and contracted no debts while he was connected with it. The bank afterwards issued bills, did business and failed. When the bank was turned over to the board of which he was a member, nothing was transferred that he knew of, but the stock and unsigned bills and plates. While he was a director he never saw in the bank, any specie, the bills of other banks, nor any money of any sort, nor did he see the note or notes of the defendant, the garnishee, nor any other notes. The bank had a book of minutes and transfer book and blank books ready for use. The witness was not present at the sale testified to by him, and could not say what was turned over. There was a cashier, while he was a director, whose duty it was to take care of the money and notes of the bank; and it was possible he might have had money and notes, and he might not have seen them.

Samuel A. Billing testified that he was elected director and President of the bank in the latter part of the year 1853 and resigned about July 1854. About that time, or a short time before, the capital stock, except a small number of shares, had

been transferred by the former owners to gentlemen in New York, and that while he was President and director he never saw nor knew of their being in the bank any specie, bills of other banks, notes or any other property or assets, except a plate, bills not filled up and blank books. When the bank was transferred, if anything was turned over except the bills, plates, books and the charter and capital stock, he never knew it. He never saw or knew of anything else being in the bank. This witness further testified that while he was connected with the bank, it did no business, contracted no debts and kept no books. Bills were signed preparatory to being issued. They were never issued but destroyed.

Sterling F. Grimes was acting as cashier; that it was the duty of the cashier to keep the cash and notes of the bank and it was possible he might have had the money and notes and the witness not know it.

The presiding Judge charged the jury, among other things, that, if they believed from the evidence, after this, (after Semmes had given his note for \$9,500) Semmes transferred the balance of his stock to Hampton S. Smith, and thereupon Smith promised the bank to pay this indebtedness of Semmes, and the bank then delivered the note of Semmes, and took Smith's verbal promise to pay it, in lieu of the note, then the debt is satisfied, the note is cancelled and they would find the issue for the garnishee. The counsel for the plaintiff submitted to the Court, in writing, six distinct requests to charge the Jury, all of which the Court refused to give to the jury, except the first, and the counsel for the plaintiff, excepted to the charge of the Court to the Jury as given and to the refusal of the Court to charge as requested.

A majority of this Court, affirm the judgment of the Court below on all the exceptions. From this judgment of affirmance I dissent.

If the bank have the right to recover of the defendant the sum of \$9,500 or any other sum, under the evidence submitted in this cause, then the plaintiff in garnishment was enti-

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tled to recover, and if the principles, upon which the charge was founded, would have been wrong if the suit had been by the bank against the garnishee, they cannot be sustained against the garnishing creditor. The same may be said in reference to the requests made of the Court in writing to charge the jury. If they ought to have been given in a suit by the bank, they should have been given in this cause. The requests of counsel to the Court to charge the jury will be seen in the Reporter's statement of the case.

Whether the charge as given was right depends on the state of facts upon which it was predicated. The charge of the Court recited above has reference to the transaction between Smith and the defendant in error and the bank in regard to the sale and transfer of the stock, the substitution of Smith's verbal promise to pay for the note of defendant and the delivery up of the note to him. The Court charged the jury, that "if Smith promised the bank to pay the indebtedness of Semmes and the bank then delivered the note of Semmes and took Smith's verbal promise to pay it, in lieu of the note, then the debt is satisfied, the note is cancelled and you will find the issue for the garnishee." There was no evidence in my opinion sufficient in law to warrant this charge. The witness on whose testimony this charge was based was Robert Kyle; and he certainly testified in so many words that the bank accepted Smith's promise to pay in lieu of Semmes' note, whereupon he as cashier delivered up to Semmes his note; yet he had shown how this thing was done in the prior part of his evidence: for he had already stated that the defendant in error had transferred his nine hundred and fifty shares to H. S. Smith in his presence as cashier; and that he, *acting on his own responsibility as cashier* took from Mr. Smith his recognizance for the \$9,500 and gave up to Mr. Semmes his note. He says this transaction was known to every officer of the bank and assented to by them, *but was never acted on at any regular meeting of the board*. It could not have been a corporate act, for the mem-

bers of a corporation aggregate cannot express their assent individually and severally to a proposition so as to bind the body. There was nothing in the minutes in respect to this matter assented to in even the irregular and ineffectual manner spoken of by this witness. There is another matter to be considered in this connection. This witness' understanding of language is singularly defective. He says he took Mr. Smith's *recognizance* for the \$9,500, and when asked, what he meant by taking Mr. Smith's *recognizance*, he replied that he took Mr. Smith's *verbal promise to pay*. If he had been asked what he meant or whom he meant by officers of the bank he might have replied, he meant the directors, or he might have said the President and cashier, himself and the defendant; for they were the only persons known as officers under the charter and who had been sworn under the requisition of the charter. If he meant, when he used that term, "officers," the President and cashier and them alone, then they had no authority to do a corporate act and could not bind the bank, and they were not the bank.

But the cashier testified that he did the act on his own responsibility as cashier. If this act fell within his ordinary *ex officio* powers as cashier, then the bank was bound by it, as if it were its own act. The cashier is the executive officer of the bank. He is entrusted with power to collect and pay its debts, and it is through and by him that its securities are discharged and transferred. He must be presumed to have authority to do all these things after a bank is organized and in operation, provided the person with whom he deals does not know his want of authority to do them, if his power be restricted. This is essential to the security of the the public against frauds by one held out to them as an authorized agent. This power, however, does not extend to giving out the capital stock the money or effects of the bank held as capital stock, prior to the banks going into operation; for although elected cashier, he is not held out to the community as having authority of any sort, before the bank commences business. If a note dis-

counted by the bank be paid, he may deliver it up, but he has no power to deliver it without payment. This bank had never been in operation, and, in fact, if the parties acted in good faith in withdrawing the capital subscribed and paid over by the commissioners under pledges to return it thirty days after the call of the President, no individual stockholder had the right to withdraw his written undertaking, and substitute therefor the mere verbal promise to pay of another person, however responsible he may have been. Such a transaction does not amount to a payment, and the bank is not bound thereby—and it ought to have been so given in charge to the jury.

The second request to charge the jury, made of the Court in writing by the counsel for the plaintiff, ought to have been given. I had no doubt upon this request at first, for it occurred to me that the stockholders might have merely desired to postpone for a short time the business of banking on their subscribed and paid capital, and might have withdrawn it, to be returned thirty days after the call of the President, for the purpose of saving the interest on their money. If the call had ever been made and the money returned, there could have been no harm in it. No one could have been injured by it. But the call was never made and the money never returned, or at least it does not so appear. The bank went into operation, and the plaintiff became its creditor and obtained a judgment. If the whole arrangement was made to evade the salutary requisition of the charter by which a substantial capital was to be secured as a basis of the circulation of the bank, it was void, and each stockholder remained indebted to the bank the amount which he withdrew from it.

For reasons stated in my remarks on the charge of the Court as given to the jury, I think the request of counsel as thirdly asked of the Court ought to have been delivered to the jury.

If the original stockholders, withdrew the amount of their paid subscriptions from the bank, and substituted therefor

their notes, with the view of making their notes the capital stock, and the bank was put into operation without the payment of the notes in specie, or such funds as the charter required the capital stock to be paid in, and the bank has failed, they are respectively still liable for the sums by them severally withdrawn. If stock be subscribed and paid in, it must remain, unless the stockholders agree to surrender their charter or abandon their privileges under it, and in either of those events the bank is at an end. If the stockholder wishes to sell his shares, he must compel his purchaser to pay him the value, and if he colludes with the purchaser to withdraw from the bank the capital paid in for the protection of the public, and it is withdrawn, they become indebted to the bank the amount collusively and fraudulently withdrawn. It is a matter for the jury to pass on, upon the whole evidence in the case. The witness Kyle said that he paid the debt for Smith, and yet no money, or notes of any sort were turned over to the purchasers within the knowledge of the new President and directors of the bank, all of whom, by the charter, were bound to be stockholders in their own right. The jury had the right to weigh this evidence.

For the reasons already assigned I think the fifth and sixth instructions asked by plaintiff's counsel ought to have been given. The cashier of a bank cannot discount a note. If he cannot discount a note he cannot discount a verbal promise to pay. He has no *ex officio* power until the bank, of which he is the cashier, goes into operation. Until then he is the limited agent of the corporation, governed strictly by its legally expressed orders and authority. He is clothed with *ex officio* powers when the bank begins business, from the necessity of the case. There is no such necessity before. His *ex officio* powers are by no means, general, they are limited to such matters and things as are embraced within the duties of his office, and in relation to which he must be presumed to have authority to act; *Bank of the U. S. vs. Dunn* 6 Pet. 59.

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He cannot discount a note. He cannot give up a discounted note until paid, and if he does, the parties to the note must remain indebted to the bank.

I am of opinion, therefore, that the judgment of the Court below ought to be reversed.

CARLTON WELLBORN, plaintiff in error, vs. SHEPHERD ROGERS and wife, defendants in error.

- [1.] One of two defendants against whom a verdict has been rendered appeals, the other does not, the defendant not appealing, being no party to the issue to be tried on appeal, is a competent witness.
- [2.] When the sworn answer of the defendant offered as a witness has been read to the Court, it was not necessary for the party offering the witness, to state what he expected to prove by him.
- [3.] The answer of a defendant, not a party to the issue to be tried, is not evidence in the cause.
- [4.] A deed made by legatees to an executor when under age is *prima facie* void, but if he show that they had the full benefit of what it was sold for at a fair legal sale, they cannot complain.
- [5.] The Court committing an error in fact in his charge to the jury, is a matter calculated to mislead the jury to the prejudice of one of the parties. cannot excuse an error of law, growing out of that mistake of fact.
- [6.] The Act of the Legislature of 1829 gives the Court of Ordinary all the powers of a Court of Chancery to the extent stated therein—in regard to the sale of a testator's property. Judges Lumpkin and Benning say they held it under the Act of 1805. McDonald thinks not.
- [7.] The failure of an executor or guardian to make returns is an omission of duty, and therefore a breach of trust, and throws on him the burden of proving to the satisfaction of the Court and jury that he has discharged the duty of his trust with fidelity.
- [8.] A receipt by a legatee to the executor, who became such by intermarriage with her mother the executrix, and with whom the legatee lived during her minority, and after her majority, to the time of the giving of the receipt, having great confidence in him, and entrusting him with her property, is no bar to an examination into the accounts prior to the receipt.
- [9.] An unbroken continuance of the management of the property of a *cestui que trust*, by a trustee, is, in effect, a continuance of the trust, and a

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settlement between the parties may be impeached for any of the causes for which a settlement between a trustee and *cestui que trust* may be impeached; and the statute of limitations will not begin to run in cases of fraud until the fraud is discovered, if the party is not in *laches*, and is under no disability.

[10.] If the fraud be committed on a *femme sole* and is not discovered until after marriage, the saving in the statute of limitations protects her during coverture.

[11.] If the trust be terminated, but the trustee continues to manage the property and maintain his influence over the *cestui que trust*, so as to stifle enquiry, that statute will not commence running until that connection is wholly at an end.

[12.] The bequest of a negro when a certain debt is paid, does not charge that negro with the payment of the debt.

In equity, From Houston county. Tried before Judge Powers at the April Term 1857.

This was a bill filed by Sheppard Rogers and Nancy L. his wife, formerly Nancy L. Gartrell, against Carlton Wellborn, for an account and settlement of the estate of Joseph Gartrell sen., deceased, and to recover from defendant the share or legacy due and coming to Mrs. Rogers under the will of her deceased father—the said Joseph.

Joseph Gartrell sen. died in Wilkes county, Ga., about 25th November, 1816, possessed of a considerable estate, real and personal, and leaving the following last will and testament, to wit:

GEORGIA, } In the name of God amen, I Joseph Gartrell sen., of the county and State aforesaid, being weak in body, but of sound, disposing mind and memory, do make, ratify and confirm this my last will and testament, disannulling, revoking and rejecting all others.

In the first place I recommend my soul to Almighty God, who gave it, and my body to be decently buried; and after my lawful debts are paid, I will and bequeath first to my son Jeremiah Gartrell, my negro man Felix, during my said son Jeremiah's lifetime, and in case said negro man Felix should

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survive my said son Jeremiah, that in that case he is to go to my five youngest children, viz: Jefferson, Charles, Lucia-hanna, Nancy Simmons, and Mary Adeline. And also give said son Jeremiah one dollar in specie.

2d Item. I give and bequeath to my beloved wife Rebecca Gartrell, in trust for my son John Gartrell, one-half of my gold mine tract of land, and it to be divided by my executor, and John to have his choice of halves after divided, and also my negro woman Henny and her three children, Daniel, Caty, and Fanny; but my further will is, that in case my son John should die without lawful issue from his body, his half of the gold mine tract of land and the four negroes Henny and her three children, Daniel, Caty and Fanny, to go to my two sons Jefferson and Charles.

3d Item. I bequeath to the lawful issue of my son Francis Gartrell's body, my two negro girls, viz: Maria, about 14 years of age, and Sukey, about the age of 12 years.

4th Item. I bequeath to my son Joseph Gartrell all my land lying and being to the east and south-east, &c. [Here follows a description of the land.] Also Nancy and her two children, viz: Sophia and Isaiah, and also Allen, when I pay Capt. A. Simons what I owe him.

5th Item. I bequeath to the lawful issue of my daughter Matilda Murray's body, three negroes, viz: Charlotte and her two children Fanny and Isaiah, which negroes I lent when she was married.

6th Item. I bequeath to my two sons Jefferson and Charles, the other half of my gold mine tract of land that my son John does not choose after my executors divide it.

7th Item. I bequeath all the rest and residue of my property to be equally divided between my beloved wife Rebecca and my five youngest children, namely: Jefferson, Charles, Luciahanna, Nancy Simmons and Mary Adeline; and my further desire is, that my beloved wife Rebecca should have the care and control of all my said five youngest children's property until they shall respectively arrive at the age of

eighteen years; then it is my will and desire that they should receive their part of the said property. It is my further will that my negro man Stephen should be hired out, and the hire appropriated to the schooling of my aforesaid five youngest children.

8th and lastly, he appoints his wife and Abraham Simons executrix and executor of his will.

This will was duly admitted to probate, and his widow, the said Rebecca, alone qualified as executrix thereof, and took possession of the whole estate (except that specifically bequeathed and devised) which consisted of a plantation and some fifteen or twenty negroes, and horses, cows, hogs, provisions, plantation tools and household and kitchen furniture, ordinarily found upon plantations, and all of which (the land excepted) by an appraisement duly made and returned to the ordinary's office, was valued at \$7,114 00.

The widow remained on the place in 1817 and 1818, with the children, and made crops; in the latter part of the year 1818, she married the defendant Carlton Wellborn, who went into the possession and management of the estate, making crops, supporting and maintaining the children and paying off debts against the estate until 1826, when he removed to Milledgeville, rented out part of the plantation and hired out a portion of the negroes. He remained in Milledgeville about two years (1826 and 1827) when he removed to Houston county, taking with him the younger children of testator and the negroes, where he resumed planting operations, and where he has remained ever since.

Jefferson, one of the younger children, died before testator; John, one of the sons, whose property was left in trust with his mother, died in 1827, without having married, and having no issue.

Defendant sold the negro man Stephen in 1819, and the woman Hetty and her children in 1821 or 1822, for the purpose, as he alleged, of paying debts, &c.

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In 1832 the four younger children, to wit: Charles, Lucy H., Nancy Simons and Mary Adeline, (Jefferson being dead) executed a deed conveying all their title, right and claim in and to the tract of land in Wilkes county belonging to the estate to defendant, "in consideration of the sum of ten dollars to us in hand paid, as well as for the full consideration, and value being allowed to us jointly and severally in the distribution and division of the negroes and other property of the estate of Joseph Gartrell deceased, which has been paid and allowed to us by Carlton Wellborn," &c. Dated 12th Dec., 1832.

On the 10th April, 1833, the same legatees executed a conveyance to two of the children of defendant by their mother, being the half brother and sister of the donors, of two negroes—Horace and Louisa—being a part of the slaves or their issue, bequeathed in said will to John Gartrell) "in consideration of love and affection."

On the same day (10th April 1833) the following instrument was executed:

GEORGIA, } Articles of agreement and settlement between us the heirs and legatees of the estate of Joseph Gartrell deceased, are as follows, viz: For and in consideration of the debts of said estate, costs and expenses having been paid by Rebecca and Carlton Wellborn, as executors, as also their being entitled to a part thereof, we do jointly and severally give over and agree to set apart to them the following negroes, viz: Merrick, Rachel and Lucy; and do by these presents give and deliver said negroes over to the said Rebecca and Carlton Wellborn. Also acknowledge the receipt of each of our parts, and give up and relinquish and set over all claim or claims, part or parts of any money or other valuable thing which is or may have been in their hands or possession from the sale of lands, negroes or other property, it having all been fairly taken into consideration and settled for; and for further consideration the said Rebecca and Carlton Wellborn are not hereafter to claim from

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I either of us any money or other thing for either boarding, clothing, schooling, or for debts and costs they have paid, provided that we and each of us do faithfully comply with this settlement and remain contented therewith, without molesting them in the peaceable enjoyment of their part, and whatever they may have received or enjoyed from said estate in part of the consideration of the above. We acknowledge the receipt the following negroes, viz: Charles G. Gartrell has received from said executor 3 negroes, viz: Peter, Charlotte and Little Lucy, Lucy H. has received 3, Fanny, Felix, and Harriet; and Nancy S. and Mary A. have received undivided 6 negroes, viz: Ailsey, Henry, Mary, Wace, and two Carolines; to which division we have all agreed and consented, and entered into mutually, and bind ourselves to be contented with what we have here acknowledged the receipt of, not to molest each other in the peaceable enjoyment of what has been allowed each. In witness whereof we have hereunto set our hands and seals this tenth day of April, 1833.

CHARLES G. GARTRELL, [L. S.]

LUCY H. GARTRELL, [L. S.]

NANCY S. GARTRELL, [L. S.]

MARY A. GARTRELL, [L. S.]

In the presence of

MARY E. WELLBORN.

JOHN HERRINGTON, J. P.

At the time of the above division and receipt, Nancy S. was about twenty years of age, and Mary A. over eighteen, and soon thereafter married John C. Mounger.

In 1839, Nancy S. intermarried with Sheppard Rogers, the complainant, and prior to her marriage on the 28th Dec., 1838, she executed a receipt to defendant and wife for four negroes, which with fifty dollars to be afterwards paid to her, she acknowledged to be in full of her part of the estate of her father, the said Joseph Gartrell, the said Wellborn and wife pay-

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ing all the debts of said estate and clearing her of all responsibility; and further reciting that said negroes were to be left with defendant and work for their own and her support until called for. Upon her marriage, shortly after, with complainant, these negroes and some other articles were turned over to him, and the fifty dollars paid.

In 1851, the following agreement to arbitrate was entered into between Rogers and Wellborn, viz:

GEORGIA,) Whereas, a controversy has arisen be-
Houston county.) tween Carlton Wellborn and Sheppard
Rogers, of said county, relative to the distribution of the es-
tate of Joseph Gartrell, late of the county of Wilkes, in said
State, deceased, and they being desirous of settling the same
upon the principles of justice and amity, do agree that a set-
tlement of their rights and interests in and to said estate shall
be made between them in the following manner, to wit:

1st. It is agreed by and between the above named parties that a list of the grand jurors which has been drawn for the county of Houston at any time within the last 18 months shall be made out (the said Carlton selecting any list that may have been drawn within that time) and that the said Sheppard and the said Carlton shall proceed to strike the names of said jurors from said list alternately, until there remain two names only on said list unstricken, and that the men whose names remain unstricken on said list shall have the power to choose a third man, and the three men selected and chosen in the manner above stated shall, by arbitration, settle all the matters of controversy between the parties relative to the estate of the said Joseph Gartrell, deceased.

2d. For the purpose of enabling the arbitrators to make a settlement between the above named parties understandingly and to dispense with the introduction of "technicalities and mystifications," the said Carlton shall make (if he desires to do so) a written statement, under oath, of all his actings and doings in relation to the estate of said deceased—that he

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shall answer all written interrogatories relative to his management of the property and effects of said deceased in writing and under oath, in the same manner that bills in Chancery are usually answered by defendants; and that all records, exemplifications of records, and depositions and affidavits pertinent to the matters of controversy between the parties shall be received in evidence by the arbitrators, who may be selected as agreed upon between the parties.

3d. That the arbitrators, if they deem it necessary, shall be at liberty to have legal advice of their own choosing at the mutual expense of the above named parties, to enable them to decide any points of law that may arise in the settlement of said controversy.

4th. The said Sheppard Rogers and the said Carlton Wellborn, each of them, hereby promise and agree to stand to perform, and abide by such award as the arbitrators selected as above and under the above rules and regulations, may make relative to the distribution of the estate of the said Joseph Gartrell, deceased.

September 22d, 1851.

SHEPPARD ROGERS,
CARLTON WELLBORN.

Wellborn afterwards refused to arbitrate, and Rogers and wife filed their bills against him, for an account, and in addition to the facts above stated, alleged that defendant from 1819 went into the possession of said estate, and used and controlled and managed the same, making large profits, which he had never accounted for and paid over. That the deed executed in 1832, for the land in Wilkes to defendant, and deed of 1833 for the two negroes to his children, were without consideration, and signed by Mrs. Rogers before she was twenty-one years old, and void. That the receipt executed by her in 1838, for her share in full of her father's estate was delivered without any knowledge, on her part, of the condition of the estate, and done by the procurement and in-

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fluence of Wellborn, her step-father, with whom she was living at the time, and that the division of the negroes was unequal. And that there was in his hands large sums and amounts derived from the income of the plantation, the sale and hire of the negroes, and the collection of debts due the testator, wholly unaccounted for, and the share of which due to complainants had never been paid over to them.

The bill was subsequently amended, making Charles G. Gartrell a party, and charging that he and Wellborn combining, &c., had collected large amounts from debts due the estate, sales of property, &c., which had never been accounted for and paid over.

The answer of Wellborn admitted the facts as to the death of testator, his marriage with his widow and taking possession of the estate, &c., but denied that he had made the large profits out of the property charged in the bill; that the plantation in Wilkes was a poor one, and that it required all and more than was made, to support, maintain and educate the family and children. That the proceeds of the negroes sold, were applied to the payment of the debts against the estate, and the support of the family—that some of the negroes were recovered from him by suit brought against him after his marriage with the widow—and that he had fully settled with and paid to complainants their full share and more than their share of said estate; and that complainants acquiesced in and were fully satisfied with said settlement; and the share turned over and paid to them from 1839 to 1851, and that their demand is stale and barred by the statute of limitations; and insists that the agreement to arbitrate as stated in the bill, is not such an admission or recognition of complainant's claim as will relieve them from the operation of the statute.

Charles G. Gartrell answered the amended bill, and denied that he had received any money or other thing belonging to the estate. That under the will of his father he was

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entitled to the legacy or estate of his brother John, at his death, and that the two negroes given by himself and his sisters in 1833, to their half brother and sister, were negroes belonging to John at the time of his death, and to which they (his sisters) really had no claim or title.

Many other facts are set out, and charges made in the bill and answers, but the foregoing summary, together with the proceedings on the trial, and the opinion of the Court, contain all the facts necessary to a proper understanding of the points adjudicated.

A large mass of testimony was offered on both sides. The complainants submitted their proofs and went through, without any exception taken to the rulings or decisions of the Court in relation thereto.

1st. Defendant then entered upon his defence, and amongst other testimony offered the depositions of Charles G. Gartrell, who was a co-defendant, by amendment to complainant's bill. The Court rejected the testimony on the ground that the said Gartrell was a co-defendant. To which decision counsel for defendant excepted, and assign the same as error, because complainants ask for no judgment or decree against said defendant. No evidence was introduced against him, and no verdict and decree against him on the first trial, but against Wellborn alone, and who had alone appealed.

The testimony being closed, the Court charged the jury that this was a question of mere calculation and has nothing to do with the *character* of the litigants.

2d. As far as the returns go, you must take them as the basis of your calculations. When the defendant ceases to make returns, you go on and calculate and make rests every six years. It was Wellborn's duty to make returns, and he can derive no benefit from failing to do so, and responding generally that he can't tell. To which charge defendant excepted.

3d. The Court further charged that any conveyance made

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by Mrs. Rogers while under age is void. To which charge defendant excepted.

4th. The Court further charged, that the legacy to John Gartrell, by the will of his father, lapsed at his death, without heirs, and Mrs. Rogers is entitled to one-fifth part of the same. To which charge defendant excepted.

5th. Counsel for complainants requested the Court to charge as follows :

1. That it is the duty of an executor or guardian to keep correct accounts and to make annual returns to the Court of Ordinary.

2. That an executor and guardian are chargeable with all the assets and effects that come into their hands, and it is their duty to use, manage and control the same for the sole benefit of the legatees and wards, and that whatever profits may be made out of the trust property belongs to the *cestui que trusts*; and the executor or guardian is not entitled to participate in said profits.

3. That when there is a will, *the will* is the law of the executor, and it is his duty to execute and obey all the provisions thereof, unless otherwise directed by a Court of Chancery.

4. That the will of Joseph Gartrell created an express trust, and constituted Rebecca Gartrell, his widow, guardian of the property of his four minor children, and upon her intermarriage with defendant, this trust devolved upon him.

[This request to charge, the Court declined, but charged that if Wellborn accepted the trust and took possession of the property, he was bound to account as executor and guardian.]

5. That it was defendant's duty to keep correct accounts and to make annual returns to the Court of Ordinary; and the law admits of no excuse, and the expense of the returns is no excuse.

6. That when an executor or guardian neglects to keep accounts and make annual returns, he is held to *strict proof*.

that he has done his duty in the management of the trust property; and that his answer to a bill in equity setting up that he has done his duty, is not sufficient, but he must *prove* it, and prove how and in what manner he has done it.

7. That Wellborn's returns to the Court of Ordinary are evidence for him, and that when he sets up in his answer payments and expenses not contained in his returns, such payments and expenses are not to be allowed him unless *strictly* proven, and the answer alone is no evidence for him.

8. That the answer of the defendant to a charge in the bill which is responsive, is evidence for him, unless overcome by two witnesses, or one witness and circumstances equivalent to the testimony of another witness; but where the answer sets up new matter not responsive to the bill, it is no evidence unless defendant prove it. So when the bill charges the defendant with having received money or property, and the defendant admits its receipt, but sets up that he paid it away, that part setting up the payment is not evidence—*he must prove it*.

9. That when Wellborn answers that he has disposed of money or property of his wards in payment of debts or expenses in educating them, the answer is no evidence, but he must prove it; and it is no excuse that he has forgotten it; he was bound to have kept accounts.

10. That Wellborn was bound to so cultivate the land and employ the negroes and other property of his wards as would have been most profitable and beneficial to them; and he is liable for the annual hire of the negroes not employed on the lands, and for the rent of the land when not cultivated; and that it is no excuse that he has forgotten the amounts of hire and rents.

11. That defendant is liable for the price of Stephen, sold in 1819, and Hetty and her three children, sold in 1821 or 1822, for the price of the land sold, for the amount he sold the perishable property for in 1826, and all property sold, rented or hired with interest at 8 per cent. for the first six

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years, and then compounded every six years up to the present time. This charge was given as requested, except that the Court instructed the jury to compute interest at 7 per cent after 1845.

12. That if the jury believe that there was any fraud in obtaining the deed for the land in Wilkes county, it is void; and as defendant admits that Mrs. Rogers was then under age, it is voidable as to her, and must be set aside and defendant held liable for the price of the land and interest, as above stated.

13. That when the defendant undertook to have a division of the property on 10th April 1833, it was his duty to have apprised his wards fully of their rights, by exhibiting to them in writing a full and detailed account of his management and expenditures of their estate from year to year, and to have furnished them with a copy of the will of their father, and had them advised and aided in the settlement and division by some impartial friend, and if this was not done and Mrs. Rogers was ignorant of her rights, or was deceived or misled by her confidence in defendant, or if she was under the age of 21 years, the division is not binding on her nor the deed then executed by her; and if the property was then in his hands, the deed is no bar. She may go behind it.

14. That the deed of gift, dated 10th April 1833, if the jury believe there was any fraud or under influence in procuring it, is void. Or if they believe it was procured by defendant while the relation of guardian and ward existed, it was a breach of trust on his part and he is bound to account to Mrs. Rogers for one fourth the value of the two negroes named in the deed, with interest. Or if she was at that time under age, it is void as to her, and defendant must account for their value, with interest compounded every six years.

15th. That as to the division and receipt, dated 28th December, 1838, and signed by Mrs. Rogers; if they (the jury) believe that Mrs. Rogers, although over 21 years of age, was

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living with defendant, and her property was under his control and management up to the time of her marriage, the relation of *guardian and ward* still continued, then the settlement and receipt are *not a bar*, and complainants may go behind it, and open the settlement; and more especially can they do this, if she was not at the time fully apprised of her rights, by an exhibition of the will and a full statement in writing of the accounts of defendant as executor; or if there was any concealment, fraud, or undue influence by defendant.

16th. That the statute of limitations does not run against a trust, so long as the trust exists, and although it begins to run when there has been a final settlement between a guardian and ward, and the ward's property has left the care and control of the guardian; yet while the property remains in possession of the guardian, the trust continues, and the statute does not begin to run, notwithstanding a settlement. And if they believe that Mrs. Rogers' legacy remained in defendant's possession up to the time of her marriage in 1839, and she has been a *feme covert* ever since, the statute of limitation has never begun to run against complainants.

All of which the Court charged as requested, except the fourth, which was modified as therein stated. And to all of which charges, counsel for defendant excepted.

The Court further charged the jury that the bequest of the negro Allen to Joseph Gartrell, made him, the negro, chargeable with the debt due to Abram Simons, and that neither the executrix Rebecca Gartrell, nor defendant Wellborn had a right to pay that debt out of the residuary estate.

To which charge defendant excepted.

Defendant's counsel then requested the Court to charge as follows:

1st. That after the lapse of twenty years from the date of a judgment, the law presumes its payment, and this pre-

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assumption, is conclusive, unless there is evidence to rebut it. This charge, as requested, the Court gave.

2d. That if Mrs. Rogers was over 21 years of age when she gave her receipt in full to defendant on the 28th December, 1838; the statute of limitations began to run against her from that time, and her marriage afterwards did not stop it, and she is barred after the lapse of 13 or 14 years.

This charge the Court refused to give, and defendant excepted.

3d. That complainants, by their amendments, having charged that the recitals in the deeds of 1832 and 1833, and also in the receipt of 1838, and all the inducements set up by defendant as leading to the execution of said papers, are false, wicked and fraudulent; the answer alleging the truth of said recitals and inducements is responsive and evidence, and must be overcome by two witnesses, or one witness and circumstantial evidence equal to the testimony of another witness.

The amendment having also alleged that defendant concealed from Mrs. Rogers her age, and her interest in her father's estate, and that he made her sign said deeds and receipt without knowing their contents; the answer denying these allegations is responsive and evidence, unless overcome by two witnesses or one witness and corroborating circumstances equal to the testimony of another witness.

This request the Court refused to charge and defendant excepted.

4th. That perjury, fraud, imposition, and bad faith, are not to be presumed, *without evidence*, especially after many years have elapsed since the events occurred, which are called in question, but the law presumes honesty and fairness.

This the Court charged.

5th. That even when the lapse of time is not a positive bar to a suit, yet that Courts of Equity regard unfavorably the assertion of a claim, where a party has acquiesced a

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considerable length of time, before resorting to the Court for redress.

This was charged as a general rule, but that when there was ignorance or disability, there might be an excuse for the delay.

To which defendant excepted.

6th. That under the will of Joseph Gartrell, sen'r, the legacy to Jefferson and Charles, did not lapse on the death of Jefferson, or fall into the residuary estate.

This the Court refused to charge, and defendant excepted.

JOHN M. GILES; WARREN & HUMPHRIES, and JAMES A. PRINGLE, for plaintiff in error.

S. T. BAILEY, *contra*.

By the Court.—McDONALD J., delivering the opinion.

This case comes up on errors assigned upon the rejection by the Court of Charles G. Gartrell's depositions offered by the defendant, and on the charge of the Court as given, and on the Court's refusal to charge as requested. The bill was filed originally against Carlton Wellborn as executor, in right of his wife, Rebecca Gartrell, of the last will and testament of Joseph Gartrell deceased. Charles Gartrell was made a party defendant by amendment of the bill. The testator appointed Abraham Simons his executor and his wife his executrix. Simons did not qualify. The wife qualified and Wellborn intermarried with the executrix, and in this manner became executor in right of his wife.

[1.] On the first hearing of the cause a verdict was rendered by the jury in favor of the complainants. Wellborn appealed, but his co-defendant, Gartrell, did not. On the appeal trial, Gartrell's depositions were offered in evidence by the defendant and the Court refused to admit them. Gartrell not having appealed, he was no party to the issue to be

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tion, and was in no manner interested in the event of the suit so far as it remained yet to be determined. This Court has held that a witness so situated is competent, and the judgment of the Circuit Court excluding his evidence must be reversed.

[2.] It was objected that the defendant had not shown or stated the facts he expected to prove by the witness; that his answer having been read to the jury, his evidence was before them; and that he having been properly a party defendant to the cause, and an appeal having been entered, he could not be examined.

The witness having answered, and his sworn answer having been read to the jury in the hearing of the Court, the presiding Judge was thereby informed of the nature of the proof proposed to be made by him.

[3.] His answer was not evidence for his co-defendant, and if it had been, at the time he made it, the defendant had no right of cross examination, nor the power to call his attention to particular facts, and being no party to the issue now to be tried, and his interest being in no manner involved, the appellant had a right to examine him and have his testimony.

The error assigned on the charge of the Court in regard to the mode of calculating interests chargeable against executors is in accordance with the repeated decisions of this Court and must be sustained.

The alleged error of the Court in the following assignments on the charge is abandoned.

1st. That it was Wellborn's duty to make returns, and that he can derive no benefit from failing to do so; and responding generally that he can't tell.

2d. That it is the duty of guardians and executors to keep and render annual returns.

3d. That it is the duty of a guardian or executor to manage the property of their *cestui que trusts* solely for their

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benefit, and that he cannot derive a benefit therefrom to himself.

4th. That the will of Joseph Gartrell appointed Rebecca his wife, his executrix and the guardian of his children, and created an express trust of them and their property, and if Wellborn on his marriage with the widow took upon himself the trust, he was bound to account as executor and guardian.

5th. That it was the duty of Wellborn to have made annual returns as guardian and executor to the Court of Ordinary, and the law admits of no excuse and the expense is no excuse.

6th. That the returns of the Ordinary are evidence for the defendant, but when, in his answer, he sets up payments and expenses, not in his returns, he must prove them; his answer is not proof without evidence in support.

7th. That what is responsive to the bill is evidence for him, until overcome with evidence equivalent to two witnesses; but when he sets up, in avoidance, any defence, as that he has received money or property, but has paid it away: this is not evidence for him; he must prove it.

8th. That when Mr. Wellborn answers, that he has paid away money or property of his ward for debts and in their education, but has kept no accounts, and has forgotten; this is no excuse, he was bound to keep accounts.

9th. That it was the duty of Mr. Wellborn so to employ the property of his wards as would be most profitable and beneficial to them, and that he is liable for the hire of their negroes and the rent of their land, when the lands were not cultivated by their slaves, and it is no excuse that as he has kept no accounts, he has forgotten.

10th. That if the jury believe there was fraud in procuring the deed from his wards for the Wilkes lands to himself, it is void, and as he admits, Mrs. Rogers was under age, it was voidable as to her.

11th. That when Mr. Wellborn undertook to have a settlement and division with his wards, touching their property

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and his guardianship and his executorship on the 10th of April, 1833, it was his duty to have apprised them fully of their rights, by exhibiting to them in writing, a full and detailed account of his management and expenditures of their estate from year to year, and to have furnished them with a copy of their father's will and had them advised and aided in settlement and division by some impartial friend; and that if this was not done, and Mrs. Rogers was ignorant of her rights or was deceived or misled by her confidence in the defendant, or if she was a minor, the deed of division is not binding on her, nor on any of them, if their property was still in his hands.

As the above assignments of error are not insisted on in this Court, we will proceed to the consideration of those that are.

[4.] It is assigned as error that the Court charged the jury, that any conveyance made by Mrs. Rogers, when under age, is void. This charge, in the abstract, is too broad, and as applicable to the case in which it was given, depends entirely on whether it was against the interest of Mrs. Rogers, that the conveyance or conveyances were made. The deed of the twelfth December, 1832, conveying the land on Kemp's creek, in Wilkes county, by the children to the executor, expresses a consideration of ten dollars, and that the full consideration and value was allowed to them jointly and severally in the distribution and division of the negroes and other property of Joseph Gartrell, deceased, which had been paid and allowed to them. In his answer, the defendant says, that the said deed was made to him to enable him to sell and convey the lands and reimburse himself in debts and expenses incurred as executor. If the estate had the entire benefit of this sale, and the land was sold for its value, and by that means other property was saved to the legatees, quite as valuable to them as the land would have been, which must have been disposed of to defray the expenses and pay the debts referred to, the infants were not injured by their

deed and it cannot be avoided. This depends on the proofs in the case. Executors should always proceed legally, and obtain orders for sale of property when the will does not direct or authorize it, and sell strictly in conformity to law. In such cases, when the sale is without fraud, he is liable for the price bid at the sale only, when he assumes the responsibility to sell without the sanction of the Court; he is bound to show the necessity for the sale, and account for the value of the property, whether it sells for it or not. This, it is true, he may prove from the circumstances of the case, but the jury should be satisfied. There can be no pretext for saying that the conveyance of the two negroes to the executor's children, was to the interest of the parties making it, and the executor ought not to have recognized it as an instrument conveying the property, and he is as much liable to those who were under age when it was made, as if it had never been executed.

[5.] The Court charged the jury that the legacy to John Gartrell lapsed on his death without heirs, and that Mrs. Rogers was entitled to one-fifth of it. John Gartrell survived the testator eleven years or thereabouts, and had received his legacy. Upon his death intestate, his estate having vested in right and possession, descended to his heirs at law, and did not fall into the residuum of his deceased father's estate. It is urged that the Court simply mistook the name of John for Jefferson, whose legacy unquestionably did lapse, he having died before the testator, but it was a mistake calculated to mislead the jury, and to induce them to decree against the defendant, one-fifth of the value of John's estate. They were told that the complainants were entitled to it.

[6.] The Court charged the jury, that when there is a will, it is the law of the executor's duty, unless otherwise directed by a Court of Chancery. The Act of 1829, giving the Court of Ordinary power and jurisdiction to order the sale of any part of a testator's estate, when it shall appear to be the interest of the estate that it should be sold, clothes the Court

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of Ordinary, to that extent, with all the powers of a Court of Chancery, but that Act having been passed long since the Court of Ordinary passed an order of sale of some of the property of this estate, can have no application. My brethren, however, think, in which opinion I do not concur, that the Court of Ordinary had jurisdiction to order the sale under the Act of 1805.

[7.] Exception is taken to the Court's charge to the jury, that if the executor and guardian omit to keep annual accounts and make annual returns, they are held to *strict proof* that they have done their duty, touching the trust property, and that it is not enough for them to answer to a bill that they have done their duty, but they must prove it, and prove how and in what manner. Whether this charge be correct, depends on the construction placed on the terms, "strict proof," used by the Court. The failure of an executor or guardian to make returns according to law, is an omission of duty, and therefore a breach of trust, and throws upon him the burden of making such proof as shall be satisfactory to the Court and jury, that he has discharged his trust in regard to the property with fidelity. He must establish it by proof, and his answer is not to be regarded except, when according to law, it may be evidence for him, and then such weight may be given to it as it may be entitled to. The Court and jury will examine the whole case, the embarrassments surrounding the executor on one hand, and on the other his management of the property, and the necessary charges upon it, and render a decree according to the justice and equity of the cause.

The defendant is bound to account for the price of Stephen, and of Hetty and her children, and of the land, and if he does not adduce evidence satisfactory to the jury that he applied the proceeds of the sales to the payment of the debts and liabilities of testator's estate, he must account in the manner hereinbefore stated, and according to the charge of the Court.

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[8.] The Court charged the jury, that "if they believe Mrs. Rogers signed the instrument called a receipt and settlement, and dated on the 28th December, 1839, just before her marriage and after she was twenty-one years of age, but while she and her property were still under Wellborn's control and management, and while the relation of guardian and ward still continued between them, that receipt and settlement are no bar, but she may go behind them and open the settlement, more especially if she was not, at the making of that receipt and settlement, fully apprised of her right by an exhibition of the will of her father, and a statement in writing of his acts, as executor and guardian; or if there was any fraud or concealment, or undue influence exercised by the defendant." This charge is excepted to, but it is in the main right. Although the actual relation of guardian and ward ceased, on Mrs. Rogers attaining the age of eighteen, yet if she and her property remained with the defendant, and he managed and controlled both, she relying implicitly on his rectitude in the management, up to the time of her giving the receipt, although she had long passed the age of twenty-one years, the presumed influence arising during the existence of the relation will be considered as operating at the time, especially if the settlement was made exclusively on the exparte statement of the executor. This was a settlement between executor and legatee, but that under its circumstances does not vary the case. He had married the testamentary guardian, and if he had no legal right to assume the position of his wife in that character, he did it in fact and acquired all the influence of the actual relation, and perhaps more, from his stepping into the place of her father, which seems to have continued, without the slightest abatement, down to the period of the settlement, the giving of the receipt, and to the marriage which took place a few days after. The receipt and settlement thus given and made are no bar to the opening of the account.

[9.] The Court further charged the jury, that "the statute

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of limitations does not run against a trust, so long as the trust exists, and although it begins to run when there has been a final settlement by a guardian, with his ward and the ward and his property have left the care and control of his guardian, yet so long as the property remains in the possession of the guardian the trust continues, and the statute does not begin to run, notwithstanding any settlement, so that if the jury believe, Mrs. Rogers' legacy remained in Mr. Wellborn's possession up to the time of her marriage in 1839, and she has been a *feme covert* ever since, the statute of limitations has never yet begun to run against the complainants, for she is the meritorious cause of the suit, and it would survive to her in case of Mr. Roger's death." This charge is excepted to. It has been held with strong reason and on sound principle that an "unbroken continuance of a guardian's management of his ward's property, after the ward has attained majority, is, in effect, a continuance of the guardianship as to the property; and between the same parties, the same principles must be applied to the accounts subsequent, as to the accounts during the period of minority. And this jealous watchfulness of transactions, which, from the relation between the parties, are so open to fraud, has been extended, when all accounts relative to the guardianship, were previously settled and the connection was at an end; but the transaction impeached, appeared to have grown out of the former relation." *Mellish vs. Mellish*, 1 *Si. Stu.* 145; *Morgan vs. Morgan*, 1 *Atkins* 488; *Goddard vs. Carlisle*, 9 *Price* 183; *Wright vs. Proud*, 13 *Vesey* 138; *Wood vs. Downs* 18 *Vesey* 127; *Revel vs. Harvey*, 1 *Sim. and Stu.* 507. This doctrine applies to transactions between the parties, and goes to the extent that they may be enquired into, notwithstanding a settlement for the same causes, and under like circumstances that settlements between trustees and *cestui que trust* may be enquired into. The whole matter may be opened and the accounts looked into, when the circumstances show undue influence, improper interference, fraud or the like. If there

has been a settlement and a receipt given, that fixes a point from which the statute begins to run, and puts an end to that *technical* kind of trust, against which the statute of limitations is not a bar. But if the settlement is made between trustee and *cestui que trust*, the former from his peculiar relation to the latter, being presumed to have a decided influence over her, without exhibiting his accounts, that alone throws a suspicion upon the transaction, and the *cestui que trust* may at any time within the statutory bar institute suit and have the settlement examined into. If a fraud be discovered in the settlement, the statute does not begin to run until the fraud is discovered, if the party labors under no disability, and is not in laches.

[10.] If the *cestui que trust* be a *feme sole*, and marry after the settlement before the discovery of the fraud, the statute does not run against her during the coverture.

[11.] If the actual trust be terminated, but the trustee continues to exercise the same control of the property and influence over the person, that he had during its existence, so as to retain power or sway over the will of his former *cestui que trust*, and stifle enquiry into his conduct, that will prevent the running of the statute. The connection must be so wholly at an end, as to indicate that the *cestui que trust* is no longer controlled by the influence which prevailed during the existence of the relation. If for any cause the statute of limitations does not begin to run against a *feme sole*, and she marries, it remains suspended during her coverture.

[12.] The Court further charged the jury that "the bequest of the negro Allen to Joseph Gartrell, made the said Allen chargeable with the debt of Abram Simons, and that the executrix, Rebecca Gartrell and defendant Gartrell had no right to pay the debt out of the residuary estate." Error is assigned on this charge. The testator bequeathed certain land and negroes to his son Joseph Gartrell, and added, "and also Allen, when I pay captain A. Simons what I owe him." The debt to Simons was to be paid. When "I pay," is the

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language of the testator. When his estate should pay that debt, and not before, Allen was to become the property of his son Joseph. He should remain and work or be hired, and contribute the proceeds of his hire and labor towards the payment of the debt, before he should become the property of his son Joseph. He was not chargeable otherwise with the payment of the debt.

What we have already said in reference to the matter of the second request made of the Court, to charge the jury by defendant's counsel, is perhaps sufficient. If the influence acquired by Wellborn over Mrs. Rogers in his character of guardian continued down to the period of her marriage, so as to repress all apprehension, on her part, of fraud in the settlement, the saving in the statute did not begin to run, and after marriage the statute protected her from its operation.

The third request of the defendant's counsel made of the Court to charge as to the effect of his answer as evidence in the particulars specified was a legal request, and it ought to have been given as asked. It would have been the duty of the jury, after giving due effect to the answer, to have looked through the whole case, and to have ascertained from the evidence before them, whether it was overcome in these particulars.

We have gone through the case and considered all the errors assigned, which were insisted on in this Court and our judgment is that the judgment of the Court below must be reversed, and a new trial ordered.

Judgment reversed.

JESSE SANDERLIN and WILLIAM SANDERLIN, administrators of Henry Sanderlin, deceased, plaintiffs in error, vs. SARAH E. SANDERLIN et al. defendants in error.

[1.] It is not proper, that a question to a witness, should assume that he has made a statement which, he says, he has not made.

[2.] A slave passed from the father to the son, on the marriage of the son, the question was, whether the slave so passed as a gift, or as a loan. The father had said, a month before the marriage, that he intended to give the son the slave.

Held, that evidence of this saying was admissible against the father.

[3.] A bill contained a statement that H. S. died "seized" of a certain slave. The answer said that H. S. and J. S. called on the defendant to bear witness that H. S. held the slave as a loan.

Held, that this was responsive.

[4.] An admission that a gift of a slave has been cancelled, is that from which a jury is authorized, though not bound, to infer a *delivery* back of the slave.

In Equity from Randolph county. Tried before Judge KIDDOO, at May adjourned term, 1857.

Sarah Sanderlin and others, as heirs and distributees of Henry Sanderlin, decd., filed this bill against Jesse and William Sanderlin, administrators of said deceased, to compel them to account for a negro man named Elias, which complainants alleged belonged to the estate of intestate.

It appeared that Jesse Sandlin, one of the defendants, was the father of deceased. That Jesse, before the marriage of his son Henry, owned the boy Elias; that shortly after the marriage of his son, which occurred about the first of January, 1847, the father gave the boy to his son, or permitted him to go into his possession, where he remained until Henry's death, about the last of 1851.

After Henry's death, his father took possession of the negro, claiming him as his own, and alleging that he had only loaned him to his son, and that if he had in the first instance given the boy to Henry, that afterwards it was agreed between them that he should hold him as a loan, and not as a gift.

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The question was, whether the negro was held by Henry Sanderlin, in his lifetime, as a gift, or a loan from his father.

The first witness examined for complainants was Ishiah Holmes, the father of Mrs. Sanderlin, who testified that in the spring of 1847, Jesse Sanderlin told him, that he had given Elias to Henry, and Bob to William, and had charged each \$500. That Henry married the daughter of witness in December, 1846. They went to house-keeping the latter part of January, 1847. The negro Elias went into Henry's possession in February or first of March, 1847, and remained there until Henry's death, in December, 1851. Negro worth \$1200, annual hire \$150.

1. Complainant then proposed to prove by the witness the amount of property owned by Jesse Sanderlin. The defendant objected to the question; objection overruled, and defendant excepted.

2. Before the cross examination this witness was asked by defendant's counsel, "If he had not told James Newton, at the April term of the Superior Court, that Johnson, after the death of Henry Sanderlin, did not belong to witness, nor to Saral never had, but belonged to Jesse Sanderlin, it all the time, for Jesse Sanderlin paid tax on him?" to which question witness answered, No. E then proposed to ask witness "that if he had told James Newton such things, had not he, witness, known that he was not his own property?" To this question complainants' counsel objected. The Court sustained the objection, and this ruling constitutes the ground of defendants' 2d exception.

3. The counsel for defendant then asked the witness how much property he, witness, was worth or owned. Counsel for complainant objected. The Court sustained the objection and defendants excepted.

4. Lewis Sanderlin, examined on the part of complainants, testified that about a month or two before the marriage of Henry Sanderlin, Jesse Sanderlin, his father, told him (witness) that

Henry was going to marry Miss Holmes, and when he married he intended to let him have Elias. Counsel for defendant objected to complainant's proving the intention of Jesse Sanderlin a month or two before the marriage of his son. The Court overruled the objection and defendant excepted.

5. After the testimony was closed, the Court, amongst other things, charged the jury that if the negro was a gift, then the father had no more right to the property than a stranger. He might, for a valuable consideration, buy him back and then give or loan him at pleasure. But a mere agreement after the gift, that it should thenceforth be considered a loan and not a gift, without a consideration or change of possession, would not pass the title back from the son to the father, especially if done to avoid the payment of the son's debts. In such a state of facts the presumption would be that the transaction was not *bonafide*, and therefore a nullity.

The Court was requested to charge the jury as to the responsive character of a certain part of defendant's (William Sanderlin) answer. The allegation of the bill was that Henry Sanderlin died seized and possessed of Elias *as his own right and property*. Defendant answered that "he died possessed of the negro, but not as his own right and property; the negro was the property of Jesse Sanderlin, and that he, defendant, had been called on by Jesse and Henry Sanderlin to witness that the negro was a loan and not a gift." The Court held and instructed the jury that the first part of this answer was responsive to the bill; the latter part was not. To this charge and instruction defendant's counsel excepted.

6. Defendant's counsel requested the Court to charge the jury,

1st. That in equity cases it requires the evidence of two witnesses, or one witness and corroborating circumstances to overthrow the answer of defendant.

2d. That corroborating circumstances alone will not overcome the answer, but it must be taken as true unless it is dis-

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proved by two witnesses, or by one witness and corroborating circumstances.

3d. That whatever is contained in the answer is evidence, if it is responsive to the bill, or in explanation of what is responsive thereto.

4th. If the negro went into possession of the son as a loan it remained a loan unless it was afterwards changed by the parties.

5th. If the jury, from all the evidence, believe it was intended as a loan, and so understood by the parties, then they must find for the defendants.

6th. The Court, after reading over each of the above charges, at the end of each, remarked, "Yes, gentlemen that is law," without any other or further charge, or remark. And to this manner of charging, defendant excepted.

7th. Defendants counsel then requested the Court to charge the jury, that if the negro went into the possession of the son as a gift; and the father and son afterwards rescinded the gift and agreed to make it a loan, then it became a loan, and no other person had a right to interfere with it, which charge the Court refused to give, and defendant excepted.

Defendant further requested the Court to charge the jury, that if the jury should even believe that the negro was a gift in the first instance, still if the parties agreed that it should be changed, and the defendant took back the negro and let his son have it as a loan, and if the son consented to this for the purpose of benefitting himself, either by thus running no risk of the negro's dying, or for any other valuable consideration, that he had a right to make the change, and he thereby parted with the title, which charge the Court refused to give and defendant excepted.

DOUGLASS & DOUGLASS, and TUCKER & BEALL, for plaintiffs in error.

PENKINS, BARRY, HOOD & ROBINSON, *contra*.

By the Court.—BENNING, J. delivering the opinion.

Did Henry Sanderlin, on his marriage, receive the slave from his father, Jesse Sanderlin, as a gift, or as a loan? If, as a gift, was the gift cancelled and the slave given back to the father?

These are the two main questions in this case.

The Court allowed the “complainants to prove the value and kind of property of Jesse Sanderlin.” The first exception is to this decision.

Is the fact, that a man was able to do a thing which, he perhaps, ought to have done, evidence that he did it? Doubtful, certainly.

Judge McDonald is clear, that the Court erred in this decision, and the other two members of the Court are not prepared to say, that he is wrong in that opinion. They are clear that there were errors on other points, and that makes it the less necessary, that they should express a more decided opinion on this point.

The second exception is thus stated: “That the Court erred in refusing defendant’s counsel to ask witness, Josiah Holmes, if he told the truth when he told William Johnson that the negro did not belong to him, witness, nor to Sarah E. Sanderlin, nor never did, but belonged to Jesse Sanderlin, and that he had known it all the time, for that Jesse Sanderlin had, all the time, paid taxes on him.”

[1.] It is assumed in this question that the witness had told Johnson a particular thing. The witness had denied telling Johnson that thing. This, therefore, was an assumption which the counsel asking leave to put the question, was not authorized to make. It was right in the Court, therefore, to refuse leave to put the question.

The second exception then is not good.

The same is true of the third. The quantity of property owned by Holmes, though he was Mrs. Sanderlin’s father, could not possibly have any bearing on either of the issues.

Sanderlin & Sanderlin, adm'rs, vs. Sanderlin et al.

One of the questions being, whether the slave passed from Jesse Sanderlin, the father, to Henry Sanderlin, the son, as a gift, or as a loan, the intentions of Jesse, existing even so long as a month before the time when the slave did so pass, were entitled to some respect. And if they were entitled to any respect, however small, evidence of them was admissible.

There is nothing, then, in the fourth exception.

The bill states that Henry Sanderlin died "seized and possessed, as of his own right," of "a man slave named Elias," "which slave had been in the possession and under the control of said Henry for more than four years immediately preceding his death, as of his own right and property."

This statement amounts to saying that Henry Sanderlin held the slave as his own property, and not as a loan from anybody.

A part of the answer of Wm. Sanderlin is in these words, "that he (Wm. Sanderlin) was called upon by Jesse Sanderlin, the father of said Henry Sanderlin deceased, and the said Henry, to witness that said boy Elias was only loaned to the said Henry, deceased, and not given to him."

This part of his answer the Court held not to be responsive to the statement aforesaid, in the bill. Two of us, Judge Lumpkin and myself, think that it was.

[3.] The answer to a bill has to be upon the "*information*," as well as upon the knowledge, remembrance and belief, of the party answering. He, therefore, is directly called on to state what his "*information*" is.

The Court refused to charge the following request:

"If the negro went into the possession of the son as a gift, and the father and son afterwards rescinded that gift and agreed to make it a loan, then it became a loan, and so remained, and no other person has a right to interfere with it."

Was there any evidence to authorize this request? Judge McDonald thinks that there was not. Judge Lumpkin and myself think that there was.

Hay, a witness of the complainants, testified that he heard Jesse Sanderlin say that he "had let Wm. Sanderlin have Bob," and charged him to him at five hundred dollars, and had let Henry have Elias, intending to charge him in the same way, but neglected to do it: afterwards finding the boys in debt, and fearing they might get into difficulties, he proposed to let them have the negroes as a loan. Henry hesitated a moment and then said he would do it, that he believed he would rather take him that way, for if the negro died he would not lose him."

This amounts to a statement by Jesse Sanderlin, that the gift had been rescinded, and in its place a loan of the negro substituted.

And such a statement is, in the opinion of Judge Lumpkin and myself, sufficient to authorize a jury to infer that every thing took place necessary to make the rescision and substitution good; and therefore, sufficient to authorize a jury to infer that a delivery, (either actual or symbolical) of the negro, by the son to the father, and a redelivery by the father to the son, took place. True, we two do not think that a jury would be *bound* to infer this, but merely that they might do so. And certainly a jury ought not to do so if the other evidence was such as to satisfy them that the inference could not be made. These are questions for the jury.

But if the statement amounted to this much, it was sufficient to authorize this request. The Court, then, in the opinion of Judge Lumpkin and myself, ought to have charged the request.

The rest of the Court's charge needs but a single remark. The contest in the case was between the father, and the representatives of the son, not between the father and creditors of the son. Therefore, it was quite immaterial, whether the cancellation between father and son, if there was a cancellation, was made to defraud the son's creditors or not.

New trial ordered.

Cleghorn et al. vs. Love.

McDONALD J., dissenting.

When a gift is perfected by the delivery of the property to the donee, in order to convert the gift into a loan, the property must be revested in the donee, for by the gift the title passed from him. To do this there must be either a conveyance in writing, or an actual or symbolical delivery of the property, and there being no evidence of either in this case, the presiding Judge ought not to have given the charge, on that point, as requested by the defendant's counsel.

The property remained in the possession of the donee down to his death, if indeed there was a gift; and there having been no conveyance or redelivery of the property to the original donor, to consummate a gift from Henry Sanderlin to Jesse Sanderlin, the charge ought not to have been given.

If the property had returned to the possession of the donor and had remained with him, the admissions of the donee that the gift had been cancelled, made while the property was in the possession of the original donor, would have been admissible.

CHARLES CLEGHORN, et al., plaintiffs in error, vs. WILLIAM E. LOVE, defendant in error.

- [1.] It is competent for a Court of Chancery to adjust, in one suit, the rights of all parties who complain of the breach of a trust growing out of the same transaction, when an investigation of one involves an enquiry into the other.
- [2.] If trustees to sell and pay debts, sell within a reasonable time for a fair value, and apply the proceeds faithfully to the payment of the debts, they have discharged the trust to that extent.
- [3.] The sale of property of the same defendant is no evidence to prove the value of property of the same kind sold a month afterwards.
- [4.] When three persons call another aside to speak to him, what one says in the presence and hearing of the others, is evidence against all.

- [5.] To enable the Court to determine whether sayings of a person, proposed to be given in evidence, were properly admitted, the sayings must be set out in the record, and the same in respect to the parts of bill in answer proffered to be read.
- [6.] Exceptions must be plainly and distinctly set forth in the record, or the Court cannot consider them.
- [7.] Decretal verdict sufficiently certain when the Court can execute it.
- [8.] New trial granted if the verdict of the jury be against the evidence.
- [9.] Trustees cannot deal with each other in the trust property, and cannot sell to another any portion of the trust property without the assent of the *cestui que trust*, who must be competent to assent.
- [10.] All debts embraced within a trust for payment of debts should be paid.
- [11.] Trust for payment of husband's debts, surplus to wife, the surplus, if decreed to husband, should be in trust for the wife, and the wife ought to be a party.—McDONALD.

In Equity, in the Superior Court of Muscogee county.
Tried May Term, 1857. Judge E. H. Worrill presiding.

William E. Love filed his bill to the November Term, 1853, of said Court, against Cleghorn, and Mrs. McDougald, the administratrix of Daniel McDougald, alleging that on the 1st Tuesday in May, 1849, certain negroes of complainants, 17 in number, were sold by the Sheriff under *fi. fas.*, but these *fi. fas.* amounted to less than the value of the negroes; that Daniel McDougald, confederating and combining with Cleghorn to purchase the property for less than its value, represented to the persons who were at said sale for the purpose of bidding for the slaves, that they were bidding for the slaves for the benefit of complainant and his family; that their purpose was to bid off the same, sell enough to pay Love's debts, and give the remainder to Love, or settle it on his family; that in consequence thereof, the persons present declined to bid, and the negroes were knocked off to McDougald and Cleghorn at a nominal sum; that at the time of the sale Love was absent from the State, but on his return was informed of the above, and not doubting the sincerity of the parties, did not immediately call on them to redeem their promises; that several times in 1852 and 1853 he, Love,

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conversed with Cleghorn, (McDougald being dead,) in relation to the matter, and he always admitted the facts as stated above, and promised to carry out the said arrangement; that in the early part of the year 1852, he called on Cleghorn for one of the negroes for a nurse, and was put off; but that in May, 1853, he demanded a portion of the negroes, when Cleghorn refused, and denied his (Love's) right to any of them; that he has sold some of the negroes, holds the others and claims them; that the negroes, at the sale, were worth fifteen thousand dollars, which was enough to pay the debts and leave a balance of eight thousand dollars.

The prayer of the bill was that the sale be declared fraudulent; that defendants be declared trustees for Love; that an account be taken, and for general relief.

The defendant, Cleghorn, by his answer admitted the sale, but denied being present at the sale, or that there was any combination or agreement with McDougald, or that he was represented by an agent; that he never bid or authorized any one to bid for him. Says his information is, that McDougald did not bid, but that Robt. B. Alexander bid off and took possession of said slaves.

He says the negroes were of bad character, and the title was in doubt, it being thought they had been fraudulently conveyed to Love, by his father-in-law, James S. Calhoun; that the negroes were liable to a *fi. fa.* controlled by Dr. Boswell vs. Calhoun, which was levied on them.

He denies that he ever made any arrangement with McDougald or any one else, to purchase said property, but says he is informed that Robt. B. Alexander, as agent for Love and Calhoun, did bid it off to re-sell and, if possible, pay the debts of Love and Calhoun; that Alexander sold to defendant, and defendant to Daniel Griffin, nine of said negroes at \$2,100, their value; that on the day of the purchase of the negroes by Alexander, he, Alexander, gave defendant an order to the Sheriff to make defendant titles to the negroes pur-

chased by him, Alexander, meaning the remainder not before that time sold by Alexander, and that his bill of sale from the Sheriff was made in pursuance of said order; that at the same time, in compliance with the request of Alexander, who was in feeble health, he also took the title to Louisa and her children; that he has never had any interest in these negroes, but did this for the accommodation of Alexander; that Alexander sold Louisa and her children to Dr. Billing for \$1,500, and this defendant executed the title to Billing; that all this was done as the friend and agent of Alexander.

He denies all combination, and denies any admissions as charged in the bill, or that he was present at the sale.

Mrs. McDougald, administratrix, answering, says the negroes were Calhoun's and not Love's; admits they were levied on as Love's, and says they were also levied on as Calhoun's; she denies that Daniel McDougald had anything whatever to do with said slaves, or combined with any one, or made any representations, or purchased any of said slaves; denies, on information, that bidding was suppressed, or was merely nominal; says that Alexander bid them off as agent of Calhoun, to pay certain confidential debts, and answers in substance what Cleghorn did.

The defendants amended their answer, setting up the agreement between Alexander, Love and Calhoun, and allege the sale by Alexander of one slave to Mrs. Sankey, one to D. Griffin, four to Dr. Billing, one to Dr. Boswell, five to Cleghorn, and four to D. Griffin; for all of which Alexander received in payment debts of Love, and of Calhoun; that Cleghorn has paid about \$2,700 of the debts of Love, specifying the debts paid; that they are informed Love consented to the arrangement and ratified it, and again say what he, Cleghorn, did in the matter, was as agent and friend of Alexander. They say that Alexander and McDougald were solicited by Calhoun to purchase said negroes and prevent a sacrifice, and to re-sell at private sale—which was without consideration; that large

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sums of money have been paid out by Cleghorn, as the agent of Alexander, in paying the debts of Love and Calhoun; that this was done with the consent of Love; and that McDougald took no part in the sale of said negroes; and they plead the statute of limitations of four years.

Upon a general replication filed, the parties went to trial, and the complainant introduced the following testimony:

John H. Davis swore that about the 15th of April, 1849, just before Calhoun and Love left for Mexico, Love, Cleghorn and witness met in a room in the Oglethorpe House, to see what amicable arrangement could be made, if any, in regard to the sale of the property of Love advertised, for the purpose of saving something for Col. Calhoun's family; that witness met at the instance of Calhoun; that it was suggested by some one that they go to see Daniel McDougald; that they went out to find him, but did not do so.

Adolphus S. Rutherford swore that on the first Tuesday in May, 1849, as Sheriff, under *fi. fas.* in favor of John L. Mustian and others, he sold, as the property of Love, 18 negroes, which were bid off by R. B. Alexander, at the aggregate price of \$3,830; that it was announced by Alexander that an arrangement had been made by which the property of Love was to be bought in and sold at private sale, to pay the debts of Love, and see if something could not be saved for Mr. Calhoun's daughter; that the purchase money was not paid, and he received no money except \$260 on a *fi. fa.*, and \$268 costs on the *fi. fa.*, which Cleghorn paid him; that he sold on the same day, city lots 35, 36, 37 and 38, as the property of Love, which were bid off by Alexander at \$150, and no money was paid; that it all seemed to be understood, and the attorneys for the plaintiff in *fi. fas.* made the settlements themselves; that on the Tuesday in April previous, he sold, as the property of Love, under a *fi. fa.*, nine negroes for \$4,393; that he received no money at this sale; the matter was ar-

ranged between the parties; McDougald and Alexander were at the sale in May; Calhoun and Love were not; don't recollect as to Cleghorn. He proved the first three exhibits to the brief.

Joseph L. Lee swore he was at the sale in May; that just before the negroes were put up, McDougald, Alexander and Cleghorn took him off, and Alexander, in presence of the other two, told him they had made an arrangement to bid off the property, and were to sell the same again at private sale, and pay the debts of Love, and see if they could not save something for Calhoun's daughter. McDougald and Cleghorn said nothing, but were near enough to hear; that Alexander asked him not to bid, and he did not do so; the negroes were put up, and the above announcement made publicly by McDougald and Alexander. He proved the value of the slaves at the sale to be \$5,350; the value now to be \$9,400, and their average annual value \$665; that before the sale, McDougald or Alexander requested him to get a statement of the judgments and executions against Love, and he found in office, *fi. fas.* against Love, to the amount of \$9,346 21; that this included the *fi. fa.* of Mustian; and after allowing thereon the credit of the April sales, there were *fi. fas.* against Love to the amount of \$5,177; that Love married a daughter of Calhoun, who originally owned the slaves and the lots; that Calhoun and Love lived together.

John L. Mustian testified he was at the April sale, and bought the negroes sold for \$4,370; that he paid no money, but had the oldest *fi. fa.*, and credited it with that amount; that his *fi. fa.* was between eight and nine thousand dollars; that after the April sale he, Alexander and McDougald met in Holt's office, when it was agreed that Griffin was to purchase the city lots at five thousand dollars, their value, and he, Mustian, was to take the notes of Griffin for the balance due on his *fi. fa.*; that he was at the sale in May, 1849, when McDougald, Cleghorn and Alexander being present, made the statement specified by Lee, except that Louisa and

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her three children were to be saved for Mr. Calhoun ; that the agreement' about the Griffin notes not having been consummated, witness bid for the negroes, and run them up to enough to pay his *fi. fa.* He took the notes of Griffin for the balance due him from Love; he testified the same as Lee about the value of the negroes.

I. A. Brokaw swore that after the sale, he sued Love and garnisheed Cleghorn, and afterwards met Cleghorn, who offered to buy his claim ; witness refused to sell the claim at a discount, or to dismiss his garnishment ; Cleghorn asked to let him have the note on Love, and he would see what he could do with it ; he, in a short while returned, and told witness his claim was not old enough, but if he would date it back, he would be able to use it, and would take it ; witness refused ; Cleghorn pressed him to dismiss the garnishment ; witness refused, and Cleghorn replied, " I dont care ; I'll be damned if I dont swear out ;" witness has a claim against Love, and expects, if Love recovers, to get his debt.

Joseph Kyle was at the sale to buy the boy Richard ; the statement was made that the negroes were to be bid off for the benefit of Calhoun and Love ; he was requested and did not bid ; that afterwards he met Alexander and McDougald ; they offered to sell Richard, and he agreed to buy him at \$700 ; that he had a small claim on Love, which they agreed to take in part payment, but Richard not wanting to live with him, he did not take him.

Complainant closed, and defendants introduced the following testimony :

Mrs. Sankey, who swore that the bill of sale to the boy Joe, was made to her by the Sheriff, and that the consideration she gave was two notes on her brother, Love, for about \$900.

Dr. Billing swore that in 1849, he bought Louisa and three children of Alexander ; that he made the trade with Alexander ; that Love and Calhoun owed him \$1,044 ; that he gave this debt and \$500 for said negroes ; that they were not

worth more than \$1,200; that Boswell had a claim on Calhoun, and by agreement, he paid the \$500 to Boswell; that before Love left for Mexico, in the month of April, 1849, he had some conversation with him about his claims, when Love told him Alexander would arrange them; and that after Love returned, he told him of the arrangement he made with Alexander, his purchase of the negroes, how he paid for them, also of the payment of \$500 to Boswell, and that Boswell had taken the boy Floyd at \$700, in payment of the balance of said debt, and all he had heard of the disposition of the property by Alexander, and Love said it was all right, and expressed his satisfaction at what had been done; that he told him how the sale in May had been conducted; that Boswell controlled the Foster *fi. fa.*; and he paid Boswell by order of Alexander.

Dr. Boswell swore he was an endorser on the *fi. fa.* of Foster vs. Calhoun and others, and as endorser, paid \$2,500. and got a transfer thereof; that he took in payment of the *fi. fa.* Floyd and \$500; that this agreement was made with Alexander, and Boswell paid him the money by Alexander's order; that this *fi. fa.* had been levied on the property as Calhoun's, and was advertised; that it was agreed by him and Calhoun that he was to have on his *fi. fa.* \$1,200 out of the May sales.

A. K. Ayer swore to the market value of Polly and her children, and Aggy and her children, and thinks their market value to have been about \$2,100; that he was a dealer in slaves.

Cleghorn then proved the payment by him of the debts of Love to the amount of about \$2,000, shortly after the sale in May.

Seaborn Jones proved that Love never owned the negroes, but that they belonged to Calhoun.

Defendants then read in evidence the originals of all the papers alluded to, and closed.

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The Court charged the jury, and they returned a verdict for complainant for \$4,954 28, and that the executions, notes and account offered by defendants as vouchers, except the amount paid on the Foster *fi. fa.*, be satisfied.

At that Term of the Court the defendants moved for a new trial on the following grounds :

1st. Because the Court refused to dismiss the bill at the hearing.

2d. Because the Court erred in admitting the evidence of Lee, Rutherford and Mustian, to prove the value of the negroes now, and their value for hire.

3d. Because the Court admitted the evidence of Rutherford, of the sale in April, 1849.

4th. Because the Court admitted the evidence of Rutherford, as to the sale of the city lots.

5th. Because the Court erred in admitting the evidence of Lee, as to what Alexander told him at the market house.

6th. Because the Court refused to allow defendant to prove what Alexander said when he sold the negroes to Billing.

7th. Because the Court refused to allow defendant to read in evidence certain parts of complainant's bill.

8th. Because the Court refused to allow defendants to read as evidence certain portions of their answers.

9th. Because the jury found contrary to the charge of the Court—the Court charging them as follows:

Gentlemen of the Jury:—The complainant charges, that on the 1st Tuesday in May, 1849, seventeen of his negroes were seized by the Sheriff and sold under executions against him; that McDougald, Alexander and Cleghorn were present at said sale, and represented that they wanted to buy said negroes as low as they could, and then sell them at private sale and pay complainant's debts, and the remainder, if any left, turn over to complainant, prevented bidding at said sale, and the consequence was, his property was sold below its value.

Complainant contends that he should recover of defend-

ants, because McDougald, Alexander and Cleghorn agreed to bid off his property at Sheriff's sale, sell it at private sale, pay his debts, and turn over the balance to him; that they did bid off 17 negroes at the nominal sum of \$3,330, but paid no money; and that there is now in the hands of Cleghorn, a large amount of property unaccounted for, after the payment of some of his debts.

If you believe McDougald, Alexander and Cleghorn attended the Sheriff's sale, and prevented competition in bidding by the bystanders, by any act of theirs, any representation of theirs, and furthermore, if you believe they did thus purchase the complainant's property for less than it was worth in the market, and that the complainant did not authorize them to do this, then it was a fraud on the rights of Love, and Cleghorn is liable for the present value of the property so purchased and bid for, from said sale until the present time. Again, if you believe it was not as I last stated, but that there was an agreement between Love, McDougald, Alexander and Cleghorn, that they should attend the sale and purchase the property of complainant, and then sell it to the best advantage at private sale, and with the proceeds pay complainant's debts, and if any remained after paying his debts, to hand him, complainant, over the balance, and that McDougald, and Cleghorn did attend said sale, bid off the property, and paid the debts of complainant, or any of his debts, then Cleghorn is entitled to a credit for whatever amount of debts of Love he thus paid, and if any sum was left over in his hands, that sum the complainant is entitled to at the hands of the defendant, Cleghorn. The defendant contends that amongst the claims he thus paid off, was an execution against James S. Calhoun, and that he is entitled to a credit for the sum of \$1,200 which he paid for that execution. Now, gentlemen, that depends upon the fact whether or not the complainant authorized the defendant to pay a debt of Calhoun with the proceeds of complainant's property. If the property was complainant's, and he did not authorize the defendant, Cleg-

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born, to pay Calhoun's debts, the defendant is not entitled to a credit for this amount.

Defendant contends that in carrying out the objects of McDougald and Alexander, he has paid off a large amount of executions, notes and accounts against complainant; complainant contends they are not paid; instead of that, the defendant, Cleghorn, has taken to himself transfers of the executions, and left the notes uncanceled, and the accounts open against him. If you believe he did receive property of complainant, to sell and apply the proceeds to the payment of Love's debts, and then took transfers of executions against Love to himself, bought notes against complainant and left them uncanceled, and accounts against complainant and left them open, defendant is not entitled to a credit for such executions, notes and accounts thus in his hands.

It is conceded on the part of the complainant, that some of executions, notes and accounts defendant says he has paid off, are paid; for them you will give defendant credit in making your verdict. Defendant, Cleghorn, contends that if he did agree, as alleged in complainant's bill, and if he did receive complainant's property to sell and apply the proceeds to the payment of complainant's debts, that the property so received did not belong to the complainant, and he is not compelled to account for the same. If you so believe the complainant is not entitled to recover of the defendant.

If you believe under an agreement between McDougald, Alexander and Cleghorn, and Love, the complainant, that the property was purchased below its value, by acts of McDougald, Alexander and Cleghorn, bidding was prevented, the complainant cannot recover.

If you believe McDougald, Alexander and Cleghorn attended the sale, and prevented competition in bidding for said property, and that they purchased it for nothing almost, without any privity, on the part of complainant, yet if complainant afterwards ratified the purchase, and expressed himself satisfied with it, then the complainant cannot recover, but

still the complainant must have ratified the purchase with a full knowledge of all the facts of the case, to make it binding upon him. The defendant pleads the statute of limitations of four years in bar, of complainants right to recover. If McDougald, Alexander and Cleghorn, attended the sale and by acts of theirs prevented competition in bidding, and the complainant was privy to all their acts, Love the complainant should have instituted his suit within four years, from the time of the purchase, but it is unnecessary to consider this charge because if the complainant was privy to their acts, he is barred a recovery. If the purchase was made under an agreement between McDougald, Alexander and Cleghorn, and Love, that they were to sell again and apply the proceeds, to the payment of Love's debts, and turn over the balance to Love, this was an express trust on the part of McDougald, Alexander and Cleghorn, and the plea of the statute of limitations of four years will not bar Love's recovery, unless defendant Cleghorn, more than four years before the institution of this suit, claimed the trust property adversely, denied the trust, and the complainant had knowledge of this fact. If Cleghorn received the property of the complainant under an agreement to sell the same and apply the proceeds thereof to the payment of complainant's debts and turn over what remained afterward into the hands of complainant, you must give defendant a reasonable time to execute said agreement, and then from that time you must allow complainant interest and whatever sums remained in defendant's hands, if any, as well as that sum itself.

If you believe Cleghorn, in carrying out the objects of McDougald, Alexander and Cleghorn, did receive property of complainant's, and sell the same, and did take transfers of executions to himself and paying the money for the same, and buying up notes on complainant, left them uncanceled, and bought accounts against complainant, and left them open, the Jury may decree that Cleghorn the defendant shall satisfy said executions, notes and accounts, in any given time within

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a short time, say ten or fifteen days, and then give defendant credit for the same in finding their verdict.

10th. Because the Court erred in its charge as set out above

11th. Because the verdict is void for uncertainty.

12th. Because the Jury found contrary to the evidence.

13th. Because the verdict is against the weight of evidence.

14th. Because the verdict is against each of defendants, and there is no evidence against McDougald.

15th. Because the Jury refused and failed to allow the payment made to Boswell on the Foster *fi. fa.* as a credit.

16th. Because the Court refused to charge the Jury at defendant's request, that if they believe from the evidence that the arrangement was, that the defendants and Alexander were to bid in the property at the May sale, and resell the same at private sale and pay the debts of Love, and try and save something for Calhoun or Calhoun's daughter, and that Love assented to or ratified this, that then Love is not entitled to recover the balance after paying his debts.

The Court granted a *rule nisi*: but refused to make the same absolute, and refused the motion for a new trial, on all the grounds specified, and the defendants excepted.

JONES & JONES; and WELLBORN, JOHNSON & SLOAN, for plaintiff in error.

W. DOUGHERTY; and HINES HOLT, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

This litigation concerns the negroes sold at the May Sheriff's sale, 1849, and charges a fraud in the purchase, by the repression of competition, under the pretence, by the purchasers, that they intended to buy them in, for the benefit of the debtor and his family—by selling the property at private sale to the best advantage, pay the debts of the defendant in execution and save something if possible for his wife. The bill

proposes to hold them to the trust, and to compel them to execute it.

The arrangement to make this purchase, if made in the first instance, in good faith, as it probably was, was made, as it would seem, from some of the evidence, with the privity of the complainant, but he was absent from the sale, having left the State before that time.

According to the allegations in the bill and the proofs at the hearing, the conduct and declarations of the three persons concerned in the purchase, Alexander, McDougald and Cleghorn, they having become the purchasers of the negroes, though they were bid off by one of them, created a trust in them for Love's creditors and his wife. The circumstances show that the creditors were apprized of the transaction, for the money was not paid to the Sheriff and we hear no complaint from them. Indeed there is positive proof from one of them, Mustain, that he was privy to it. The negroes were purchased for much less than the amount of the execution debts of the defendant, although their value exceeded it considerably. The complainant was not without interest in this matter, although the trust was for the benefit of the creditors and the wife of complainant, for if not carried out as promulgated at the sale, his debts would be left unpaid, and he subjected to harassment by his creditors. The object of the bill was to bring the parties sued before the Court for an account of the whole matter.

[1.] At the hearing, it seems from one of the grounds in the motion for a new trial and the opinion of the Court delivered thereon, though it does not appear elsewhere in the record, that a motion was made to dismiss the bill, because it states conflicting equities. It is one of the maxims of a Court of Equity that it will not do justice by halves, and what constitutes its chief value is, that it can bring before it all parties engaged in a transaction, and however diversified their interests and liabilities may be, it can frame a decree giving each complainant his right, and holding each defendant

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to his proper accountability. I am not to be understood as intimating that different subjects matter may be united in one bill against the same defendant; or that very dissimilar matters growing out of the same transaction, against several defendants, may be joined in the same bill.

But, when investigating one of several branches of a case growing out of the same transaction, the others are to some extent involved, they should all be inquired into in one suit. To illustrate by this—if the defendants instead of paying the debts of the complainant, take an assignment of them, when paid from the proceeds of the sale of the property purchased at the Sheriff's sale, neither the creditors nor the wife, are injured by that transaction, the creditors are paid, but the wife is injured by their refusing afterwards to pay over to, or settle on her, the surplus of the proceeds after purchasing up the debts. If those things be done they are breaches of the same trust, and the inquiry into one brings before the Court, the violation of the other, for the wife is entitled to the surplus after paying the debts, and the amount of debts paid, or to be paid, must be ascertained. It is, therefore, competent for the Court, in a single suit, to adjust the rights of all the parties who complain of breaches of trust growing out of the same transaction, when an investigation of one involves an inquiry into the other.

[2] If the defendants, or either of them sold the negroes, at any reasonable time after the purchase, by which I mean, allowing time to find a purchaser, the first issue to be tried, is whether the sale was free from fraud and for a fair value, and the proceeds faithfully applied to the debts, if so the trust is so far executed; if not, and the sale was fraudulently made for less than the value of the property, but the proceeds were applied to the debts, then the defendants are accountable for the difference between the full value the time and the price at which they were sold and interest on that difference.

[3] The sale of negroes in April had no connection with

the sale in May. The record exhibits nothing to show that that evidence was properly admitted. The price for which they sold is no evidence of the value of negroes sold a month afterwards. The difference may have been in the value of the negroes. It does not appear that the defendants pretended to set up that debts paid by the April sales, were paid by the proceeds of sales in May.

So in regard to the sale of the city lots. The debt paid by that sale was not produced as a debt paid by the sale of the negroes.

[4] Lee's testimony as to what Alexander told him at the market house was properly admitted. He says the three purchasers took him aside, and what the one who spoke said was in the presence and hearing of the others.

[5] This Court cannot determine whether what Alexander said, when he sold the negroes to Billing, was properly admitted, or not, as it does not appear in the record, but if what he said, was said while doing an act in execution of the trust, it was properly admitted.

The parts of the bill and answer proposed to be read in evidence to the Jury are not set forth in the record, and this Court cannot therefore determine whether they were properly ruled out or not.

We are not prepared to say that the verdict of the Jury is not in conformity to some one of the aspects of the case presented to them by the Court in its charge.

[6] The plaintiff in error sets forth a long charge of the Court, presenting the case in many different views and there is a general exception to the entire charge. The exceptions must be plainly and distinctly set forth, or the Court cannot notice them. *Acts of 1855-6, p. 201.*

[7] The verdict is sufficiently certain to ascertain the subjects on which it is to operate, and to enable the Court to cause the decree to be executed.

[8] The verdict of the jury is, we think, against the weight of evidence under the law, applicable to facts in proof. It

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appears from the evidence that many of the negroes were sold shortly after the purchase, principally in payment of the debts and, according to the witnesses of complainant, they sold for their value, or so near it, that the difference furnishes no evidence of fraud in those sales. Those debts according to the terms of the trust became extinguished as debts of Love; but for the trustee to take an assignment of them, and keep them open is a fraud, he may be compelled, as the Jury have required him to do, to satisfy the whole of them, whether they be due by judgments, executions, notes or open accounts. If the property was fairly sold, and the debts embraced within the trust paid, there is nothing to complain of in a Court of Chancery. But it appears that negro woman Polly and her children are still in the possession of defendant Cleghorn. He claims to have purchased them of one of his co-trustees. Dealing of that sort among the trustees themselves in respect to the trust property, without the assent of a *cestui que trust*, competent to assent, are void. They cannot be supported. The defendant Cleghorn is accountable for the present value of Polly and her children, and their descendants if any, together with their hire. If the proceeds of the sale of other trust property are not sufficient to reimburse him for all the debts of Love which he has paid, the proceeds to be considered as having been applied at the time they were received, or ought to have been received, then he is entitled to be allowed any unpaid balance with interest from that time to the time of trial, or at which the value of Polly and her children is estimated.

The verdict is larger than an account thus taken would warrant. If it had been increased by an allowance to the complainant of the reasonable expenses of prosecuting the case, it would still be too large. This being the case of a trustee refusing to account when an account was demanded, and he offered no reasonable excuse for not accounting, such allowance might, perhaps, have been made, but there is noth-

ing in the pleadings or evidence which shows that the verdict was at all increased by such allowance.

[9] The trustees are all liable. They are co-trustees, and it is the duty of each one to look after the trust property and to see that there is no misappropriation of it by a co-trustee. This is the general rule, and there is nothing in the record to take this case out of its operation. Perhaps if one trustee committed the breach of trust on which the account is decreed, the Court might so mould its proceedings as to require the guilty party to respond first. I do not say it would do it. It certainly would not if the *cestui que trust* is to be delayed by it. The verdict against all is right.

[10.] Whether the Jury was right in refusing to allow the payment to Boswell, we have perhaps substantially decided in that part of the decision wherein we have said that the verdict of the Jury is against the weight of evidence. If the debt was embraced within the trust, it was right to pay it. From the evidence of Dr. Billing, Love had said to him previous to the sale, and before he left for Mexico, that Alexander would arrange his claims, and that after his return he informed him how it had been done and of the payment to Boswell, and he said it was all right. The inference is pretty strong that Alexander was the agent of Love in this business, and that he sanctioned on his return what he had done in respect to the payment of Dr. Boswell's debt. There may have been good reasons for it, for Dr. Boswell had had some of the same property levied on as Calhoun's, and that levy had been dismissed on an understanding between them, (Calhoun and Boswell) that his claims should be paid from the proceeds of the May sales. Calhoun, it is true, had no power to bind Love or his property to that engagement, but Love's subsequent assent to the doing of the very thing by his own agent, is strong evidence that it was done by his authority, and upon a motive sufficiently strong to amount to a consideration. He might have been desirous of avoiding a contest with Calhoun's creditors in respect to the property.

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[11] The request of the defendants counsel to the Court to charge the Jury as set forth in the 16th ground in the motion for a new trial, was not, as a whole, warranted by the evidence in the case, but I am of opinion that the trust is a valid one for Mrs. Love and that she, through her next friend, can enforce it, and that, properly, she ought to have been made a party complainant to the bill. If a decree be rendered for the complainant, it ought to be in trust for his wife. If there be any creditors of Love unprovided for, if existing at the time of the Sheriff's sale, and not paid, nor any parties to this bill, there is nothing to prevent their being heard against the settlement.

SAMUEL KOOCKOGEY, plaintiff in error, vs. the adm'rs of ABNER H. FLEWELLEN, deceased, defendants in error.

When the bill itself shows upon its face that the only rights to which the complainant is entitled, can be just as well provided for and protected at law as in equity, the bill will no longer be retained.

In Equity, from Muscogee. Decision on demurrer by Judge WORRILL, May Term, 1856.

Lewis J. Davis brought suit against Abner H. Flewellen, administrator of Nathaniel H. Harris, deceased, on a demand due and owing to him by Harris, and to which Samuel Koockogey was surety.

The administrator pleaded *plene administravit pactu*, whereupon the jury found "for the plaintiff the sum of \$1383 37, with interest and cost to be recovered out of the assets, admitted by the plea of defendant to be in the hands of the administrator," upon which verdict judgment was entered and

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signed 25th June, 1843. Principal, \$1388 37 ; interest, \$276 60,

Afterwards, and before the payment of this judgment, Flewellen died, and Koockogey, to whom the judgment had been assigned, brought an action of debt against the administrators of Flewellen, suggesting a devastavit.

This bill is filed by Flewellen's administrators to enjoin said suit, and for directions, and sets out that their intestate, as administrator of Harris, failed to collect and realize the assets in his hands, and contained in his said plea, and calls in all the creditors of Harris to litigate and interplead.

To this bill Koockogey demurred on the grounds,

1. Because complainants have not made in their bill any such case as entitles them to the relief prayed.

2. Because there is no equity in the bill.

3. Because there is no community of interest or privity between the defendants to said bill.

4. Because said bill is filed against defendants for distinct and independent matters, in many of which Koockogey has no interest or concern, and the adjudication of which will be tedious, expensive and prolix.

The Court overruled the demurrer and counsel for Koockogey excepted.

JONES & JONES, for plaintiff in error.

HINES HOLT, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

It is not true, as the record shows, that the recovery in favor of Lewis J. Davis against Flewellen, as the administrator of N. H. Harris, is a judgment *quando*. Flewellen admitted by his plea to the action that he had certain debts of the intestate in his hands; and the verdict of the jury and the judgment of the Court were, that the demands due Davis should

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be satisfied out of these assets, which are specifically set forth in the judgment.

When this case was up before, (5 *Ga. Rep.* 274) this Court said, "It is the duty of the administrator when sued, so to plead as to protect all the creditors, of whose debts he had notice, in their rights according to the dignity of their debts as established by law, and if he fail so to do he becomes personally responsible. He is cognizant of the assets in his hands. It is his duty, and also his interest to exhibit the assets, his actings and doings in the administration, the debts due, their dignity, &c., and cause a judgment to be entered which will protect all parties in interest, and himself, also. And if this cannot be done at law, he has the right to invoke the aid of a Court of Chancery. If therefore, there were demands against him of which he had notice, of equal dignity and greater amount than the value of the assets in his hands at the time of the rendition of the judgment, and he failed to plead them, so as to protect himself, he is individually chargeable; and equity will not disturb the relation which the law has established between himself and the judgment creditor."

Thus it will be seen that by the judgment of this Court there was no equity in favor of Flewellen as to those debts, which were known to him at the time judgment was rendered in favor of Davis.

But one H. M. Smith had sold a tract of land to N. H. Harris in his lifetime, giving Harris his bond for title; Harris paying about one half the purchase money. Harris sold the land with covenant of warranty to one Noah Laney, with the knowledge of Smith. For the residue of the purchase money due by Harris to Smith, Harris, by agreement with Smith, took up Smith's note to one Hays, substituting his own in lieu thereof, with Smith as security, and at the same time there was a verbal understanding between Smith and Harris that if Smith had the note to pay, that the balance of the original debt upon the land should be considered still due to

Smith. Smith paid the note to Hays, and then brought ejectment in Alabama and recovered the land of the heirs of Laney.

Upon this state of facts, we held that the substitution of Harris' note for Smith's to Hays was, in law and in equity, a payment of the amount of the purchase money due by Harris to Smith for the land; and extinguished all claims on account of the land, against the administrator of Harris, growing out of the original contract of sale; and that Smith was a suretyship creditor only, and as such subrogated to all the rights of Hays in the distribution of the assets; and that he was entitled to be let into a *pro rata* participation as a note creditor of the fund in hand. This claim of Smith's however, to be off-setted with the money paid to him by Harris on the land, and which he, Smith, was bound to refund. And further, that the Laney claim against the estate of Harris, on account of the breach of warranty, was good and must be allowed.

I will add right here, that Flewellen was notified of the pendency of this suit, and he was excused from interfering because his letters of administration did not reach into a foreign jurisdiction. Smith, however, ought never to have recovered this land. The facts already recited show not only that he was cognizant of the sale by Harris to Laney, but that he had been fully paid by Harris for the land. Let this however, pass.

Now the supplemental bill charges that the Laney's have never been evicted by Smith, but that they are still in the possession and enjoyment of the land. And that Smith (acting upon the suggestion of this Court, we suppose,) had executed and tendered a deed to the Laney's for the land, a copy of which is appended to the bill. If this be so, the Laney's have no claim for damages against the estate of Harris. Their title is complete, and Smith is the only creditor whose debt is to be provided for in the distribution of the assets; and this can be just as well done at law as in equity. And this

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being so, there is no equity in the bill as against Koochokey, the assignee of Davis.

To give full protection to the Laney's, Smith, before he is let in, should be required to file in the Clerk's office, a deed to the Laney's for the land, and also a release to the judgment in ejectment in Alabama; and all benefits resulting to him therefrom. Should he neglect or refuse forthwith to do this, then he should be remitted to the *status* which he occupied under the former decision of this Court in this case: and the heirs of Laney will then come in for the purchase money, with interest thereon, paid by Noah Laney to Harris, for the land. A judgment on one of the land notes for \$300, and a note of \$600 are still due the estate of Harris by the Laney's. The amount of these demands should of course be set-off against the claim for damages due the Laney's.

In any event, whether Smith or the Laney's be the creditor, the matter can just as well be adjusted by plea to Koochokey's suit, as in equity. The rights and liabilities of all other parties to the bill are to be regulated by the law, as settled by this Court in its former judgment in this case.

Of course, if any of the assets, out of which Davis' judgment was to be paid, have been lost or rendered unavailable, without fault on the part of Flewellen, his estate, or that of Harris, should be relieved from liability to that extent.

Judgment reversed.

Green, adm'r, et al. vs. Ross and wife et al.

JAMES M. GREEN, administrator *de bonis non* et al., vs. **THOMAS L. ROSS** and wife, et al.

When causes are referred to an arbitrator who is to pass upon questions of law and fact, and also all the equities involved, with the right of any party interested to appeal therefrom to the Supreme Court on any question of law or equity passed upon and decided, the Court will not reverse the judgment of the Court making the award its judgment, if the law and equity upon the facts as found by the arbitrator are correctly administered.

In equity, Bibb Superior Court, decision by Judge Powers, June, 1857.

The question adjudicated in this case will sufficiently appear from the decision. The Court having held and decided that no right of appeal from the finding of the *facts* by the arbitrator was reserved, it is unnecessary to set out these facts or the awards, both of which are very voluminous. The causes named were "referred to the arbitrament and award of the Hon. A. H. Chappell, who is to pass upon all the questions of law and fact, and also all the equities involved—his award to be delivered to the clerk of said Court, and be entered on the minutes and made the judgment of said Court, with the right of any party interested to appeal therefrom to the Supreme Court on any question of law or equity so passed upon and decided, within thirty days from said award."

The arbitrator made up his award and returned the same to the Clerk of the Superior Court, then in session, and the presiding Judge (ABNER P. POWERS) signed a decree or judgment in pursuance of said award, and which judgment, with the award and the journal of the arbitrator, was ordered to be and was entered on the minutes of said Court.

To this award and the judgment of said Court, James M. Green, administrator *de bonis non* of Samuel J. Ray, and H. K. and J. M. Green excepted, upon the following grounds, to wit:

1st. That the arbitrator erred in awarding that Ray & Ross were partners in the public printing.

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2d. That he erred in awarding that there was \$2043,77 due to Calvin G. Wheeler out of the State printing fund as the assets of the firm of Ray & Ross.

3d. That he erred in deciding and awarding that the fund arising from the State printing was assets of the firm of Ray & Ross.

4th. That he erred in awarding to Thomas L. Ross the sum of \$800 for his personal services in carrying on and completing the State printing job, after Ray's death, and also in awarding to him the sum of \$1334,48 for his expenses in carrying on and completing said job.

5th. That he erred in deciding and awarding that the sums due to Calvin G. Wheeler and Thomas L. Ross were debts of a partnership character, against the assets of Ray & Ross.

6th. That he erred in awarding and deciding that the money in the hands of Thomas P. Stubbs, and the amount paid by Hall, administrator to the Messrs. Greens, was assets belonging to the firm of Ray and Ross, and that he also erred in awarding and decreeing that the said Greens should pay said money or any part thereof to said Wheeler and Ross, and in awarding that said Wheeler and Ross should be allowed to enter up judgments against said James M. Green, administrator as aforesaid, and said James M. Green and Henry K. Green.

7th. That he erred in awarding and deciding that the money or assets in the hands of the Messrs. Green were partnership assets to be equally divided between Thos. L. Ross, survivor, and James M. Green, administrator *de bonis non* of Samuel J. Ray.

8th. That he erred in awarding and deciding that the funeral expenses and expenses of the last illness of Samuel J. Ray should be paid by James M. Green, administrator, &c., out of the surplus in the hands of J. M. and H. K. Green, and also in awarding that H. K. and J. M. Green should pay

said administrator a sufficiency of said surplus for said purpose.

9th. That he erred in awarding and deciding that the price at which H. K. and J. M. Green purchased the Telegraph Printing Office, &c., was \$7000 and that there was still any amount due from them to said Thomas L. Ross as survivor of Ray & Ross.

And be it further remembered that on the said 24th day of June, 1857, aforesaid, the said award having been returned and filed by said arbitrator, in the Clerk's office of said Court, his Honor did adjudge and decree that the same be made the judgment and decree of the Court, and the said James M. Green, administrator as aforesaid, and James M. and Henry K. Green on this the day of July, 1857, being within thirty days from the adjournment of said Court do say that the Court erred,

1st. In adjudging and decreeing that the said Thomas L. Ross do recover of the said Thomas P. Stubbs the sum of \$1492 76.

2d. In adjudging and decreeing that Calvin G. Wheeler do recover of said Thomas P. Stubbs the sum of \$1220 37.

3d. In adjudging and decreeing that said Thomas L. Ross do recover of said James M. Green and Henry K. Green the sum of \$1488 37, and in adjudging and decreeing that said Ross do recover of said James M. and Henry K. Green, partners, the sum of \$820 05 for cost.

4th. In adjudging and decreeing that Calvin G. Wheeler do recover of James M. and Henry K. Green the sum of \$823 40, and in adjudging and decreeing that said Wheeler do recover of said James M. and Henry K. Green the sum \$16 25 for cost.

5th. In adjudging and decreeing that the said James M. Green and Henry K. Green, partners as aforesaid, do pay over to said James M. Green, administrator *de bonis non* of Samuel J. Ray, the sum of \$592 65.

6th. In adjudging and decreeing that execution do issue

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against the said James M. and Henry K. Green or either of them, for the various amounts adjudged against them.

POE & GRIER; and COLE, for plaintiffs in error.

GRUBBS & HILL; NESBITS; WHITTLE; and RUTHERFORD, *contra*.

MCDONALD, J., delivering the opinion.

This cause comes to this Court on exceptions to the decision of the Court below, making the award of the arbitrator the judgment of the Court. The causes pending between the several parties in this voluminous record were referred by the order of Court with the consent of parties, to the arbitrament and award of the Hon. Absalom H. Chappell. He was to pass on all the questions of *law* and *fact*, and also on all the equities involved. The right of any party interested to appeal to the Supreme Court from the decision of the arbitrator on any question of law or equity was reserved. No right of appeal from his finding of the facts was reserved. The majority of the Court is of opinion that the arbitrator, having found the facts as he did, pronounced correctly the law and equity of the causes arising on those facts as found; and that the most of the errors, if not every error assigned in the special assignments, when examined, will be found to be based on the finding of the facts.

It follows, as a matter of course, that if the errors are assigned on the finding of the facts alone, there is nothing that this Court can consider, and that the judgment must be affirmed.

I doubted in regard to two matters determined by the arbitrator, and I am not satisfied that he determined correctly in regard to them. The first is in regard to the State printing. I think there is a difference between a contract with the State for the public printing, and a contract for the execution of the job after it is engaged. A member of a printing firm may be chosen State printer. The acceptance

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of the appointment makes him responsible for the public printing. It is an individual engagement. Other members of the firm are not committed or bound by the election, and may or may not refuse, if an opportunity be afforded them, to unite with the elected partner in the contract. He may nevertheless engage his own firm to do the work, paying them, for the work and pocketing the profit or loss himself. Ray, as the State printer, may have employed any other printer or printing firm to execute the job. If he employed his own firm, they became partners with him in the job, and whatever profit they may have made they should share with him; but if there was a difference between the price paid for executing the job and the price paid the State printer, the latter was entitled to that if more, and bound to pay if less. According to the evidence in this case, the arbitrator might have found that Mr. Ross was partner in the contract; or that he was partner in the job only. My own opinion is, that the preponderance of the evidence is in favor of the latter proposition. Mr. Ross says in his answer that Ray took and received him as an equal partner in the public printing, at the time the partnership of Ray & Ross was formed, and that was a part of the consideration which induced him to enter into the partnership. He does not say that he was taken as an equal partner in the contract. In fact, he does not seem to have known what the contract was, but he does seem to have heard that Ray had other partners in that, who were to share, in some way, in the profits of the business of State printing, but does not know it to be true; that S. T. Chapman claimed an equal interest in the profits, that the sum of five hundred dollars was paid him; that he paid Edward J. Hardin, *by order of Ray*, fifty dollars, and a thousand dollars more were paid out. Ray was to have the work done, and the profits were to be divided among the partners to the contract. The profits could only be ascertained by deducting from the contract price with the State, the price for which Ray undertook, with his partners, to execute the job

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The job was executed by the same hands, no doubt, who executed other jobs for Ray & Ross, and if Ross was a partner, he was entitled to his share of the profits made by the job under Ray's contract with his co-partners in the contract. The testimony of Dr. Collins accords well with this view of the matter. He was called on by Ross to stand Ray's security as *State printer*, and when asked why he did not call on his own brothers to stand Ray's security, he replied, to the effect, that it was Ray's business, though he had an interest in it. Perfectly consistent with the fact that Ray's was the contract with the State and entitled to the profits of that contract; while Ray & Ross were to execute the job for Ray.

The arbitrator proceeded to decree precisely as though he had found that Ross was interested in the contract, and not in the job only. If that was his finding, his decree is in accordance with my opinion of the law. That was certainly the interpretation of the majority of the Court of the finding. The language of the arbitrator is, "that this job of State printing was embraced in the partnership as much as any other job which had been secured or engaged by Ray before the partnership, but were not commenced or executed until afterwards." According to the *words* of the award, Ross was interested in the job; according to the decree, to make it right, he must have been, in the opinion of the arbitrator, interested in the contract also. The majority of the Court may have construed the finding of the arbitrator correctly, that Ross was interested in that contract; but if that finding, being of a fact, be wrong, this Court, I conclude, has no power to correct it.

The other point on which I had some difficulty grows out of a decision of this Court on the effect of the lien of a judgment against one of the partners individually, on the interest of that partner in the property of the firm of which he is a member. If it be a lien on that interest, so as to entitle the purchaser of it, when sold, to take it divested of a lien for the firm debts, not reduced to judgment, (being judgments

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of older date) then it is a prior legal lien, and according to the rules of a Court of Chancery, if there be funds in its hands, on which there is a legal lien over-riding equitable liens on the same fund, the legal lien must prevail. If it be a correct construction of our statute in respect to the lien of judgments on the property of the defendant, that a judgment against an individual member of the firm binds the partnership property of that member of the firm, to the exclusion of the equitable lien of partnership creditors, then the oldest legal lien on Ray's property ought to have prevailed.

I think that the decree of the arbitrator is in conformity with the old rule; but I do not see how it can stand consistently with the ruling of this Court to which I have adverted, and which I am not calling in question.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT ATLANTA, MARCH TERM, 1858.

Present—JOSEPH H LUMPKIN,
CHARLES. J. McDONALD, } Judges.
HENRY L. BENNING,

WILLIAM JENNINGS and others, plaintiffs in error, vs. ANDERSON M. PARKER, defendant in error.

Jones vs. Jones, in 7 *Ga. Rep.* 76, recognized and followed.

Trover, from Fulton county. Tried before Judge BULL at October Term, 1857.

This was an action of trover by Synthia Jennings and others, heirs and distributees of Allen Jennings, deceased, against Anderson M. Parker, for the recovery of a lot of negroes, which he Parker received in right of his wife, under the will of said Allen Jennings, deceased, and upon her death the same were claimed by the plaintiffs as the heirs at law of the testator.

The following is the portion of the will upon which plaintiffs relied, to-wit:

The rest of my property, both real and personal, I give and bequeath and devise to the following persons upon the conditions and restrictions following, to-wit: Equally to my sons William and Thomas and to my daughters Julia Ann,

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Rhoda Sophronia, Ony, and Elizabeth Jane; and as respects my said daughters, I give the same to them and them only personally, individually, exclusively, and to their children and not to their husbands. The property and interest which may fall to and belong to the said Julia Ann, Rhoda Sophronia, Ony and Elizabeth Jane, my daughters, is hereby willed and devised to them and each of them and their children, the children of their bodies, and not their present or future husbands of them or either of them; not to belong either in right or disposition to their husbands, but as before mentioned, is hereby willed and bequeathed *bona fide* in right and use to the said Julia Ann, Rhoda Sophronia, Ony, and Elizabeth Jane, my daughters, and their children respectively, and to them only, so long as they or either of them shall live. In the division, the said William and Thomas, Julia Ann, Rhoda Sophronia, Ony, and Elizabeth Jane, taking share and share alike, the latter for themselves and their children, each child representing one share or part."

Upon the trial, it was admitted that defendant was in possession of the negroes sued for, and that *Ony*, his wife, and one of the daughters of testator and legatee in said will, was dead, and that she left no child or children, and had never had a child. It also appeared that defendant was married to said Ony at the time of the making of the said will.

The presiding Judge held and ruled, that Mrs. Ony Parker having died without ever having a child, that the will created an estate tail, and the property vested absolutely in her husband.

The jury under the charge of the Court, found for the defendant, and plaintiffs excepted.

M. M. TIDWELL, for plaintiffs in error.

HAYGOOD; EZZARD & COLLIER, *contra*.

By the Court.—BENNING, J. delivering the opinion.

The Court below held, that the will created an estate tail in Mrs. Parker.

We think that it created in Mrs. Parker, only an estate for her life.

The will is precisely like that in *Jones vs. Jones*, 7 Ga. Rep. 76, from which it was no doubt copied; and that will was held to give only a life estate.

The decision in that case, has not been reversed by any subsequent decision. The decision in *Smith vs. Johnson* was not intended to be in reversal of it.

In respect to *Smith vs. Johnson*, I must remark however, that I did not sit in it, having been of counsel in it, and that I cannot give it my approval. I think it directly in conflict with the lessee of *Miller vs. Hart*, (12 Ga. Rep. 357,) and with Wild's case, (the better part of it at that,) in 6 Ga. Nor do I very well see, how it is to be distinguished from *Jones vs. Jones*, above referred to. It does not appear, that any of these three cases was before the Court, when it decided *Smith vs. Johnson*.

We think that the Court erred, and therefore, that there ought to be a new trial.

Judgment reversed.

JOHN BIRD, plaintiff in error, vs. JOHN A. BREEDLOVE, defendant in error.

[1.] In an application to the Legislature for a pardon, it is not unlawful to use before the Legislature an authenticated copy of the evidence taken down on the trial of the convict.

[2.] The business of attending to applications for pardon, is not restricted to attorneys at law.

Bird vs. Breedlove.

Assumpsit, from DeKalb county. Decided by Judge BULL, October Term, 1857.

This was an action of assumpsit upon a promissory note for \$1,000, given in 1853, by the plaintiff in error, who was the defendant in the Court below, to William T. Williamson, and by the said Williamson transferred to the defendant in error.

Counsel for the defendant below amended his plea substantially as follows: The consideration of said note is illegal, and said note void on the ground, that the consideration of said note was that the said payee thereof should assist in getting the Legislature of said State to pardon Elijah Bird then under sentence of death for murder, and that by the contract the said payee was to use the authenticated copy of the evidence used on the trial, and none other was used by said payee in making his argument to the Legislature, and that said payee was not an attorney at law.

It was agreed by the counsel for the plaintiff and defendant, that the plea should be considered as demurred to, and stricken out, that the plaintiff should take a verdict, and the defendant be at liberty to carry the case to the Supreme Court.

Counsel for defendant then filed his bill of exceptions alleging that the Court erred :

- 1st. In sustaining said demurrer and striking said plea.
- 2d. In allowing said verdict and judgment.

HAMMOND & SON, appeared for defendant in error.

GARTRELL & GLENN, *contra*.

By the Court.—BENNING, J. delivering the opinion.

Was the plea good?

Two reasons only, are relied on in support of it :

- 1st. That, by the contract between John Bird and William-

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son, the latter was to use before the Legislature, in the effort to procure the pardon of Elijah Bird, an authenticated copy of the evidence taken down on his trial.

2d. That Williamson was not an attorney at law.

Neither of these reasons was sufficient.

[1.] As to the first;—the Act of 1819, says: "In all cases of application for pardon or reprieve, a certified copy of such evidence," (evidence taken down like this was,) "shall accompany such application." *Cobb's Dig.* 859.

[2.] As to the second—what law is there that restricts business of this sort to attorneys at law? We know of none.

Judgment affirmed.

HOSKINS, HUSKILL & Co., plaintiffs in error, vs. JOHNSON & GARRETT, defendants, and The Planters Bank of Savannah, claimants, defendants in error.

[1.] *Hoskins, Huskill & Co.* sued out a garnishment against Cothran and Sloan. The Planters Bank of Savannah sued out a garnishment against Sloan only. The plaintiffs in both cases were in pursuit of the same debt. That was a debt due from *Cothran & Sloan*, and not from Sloan *separately*. Cothran was living.

Held, that the debt was attached by the garnishment of *Hoskins, Huskill & Co.* to the exclusion of the garnishment of the bank.

[2.] A caution as to *Dennis vs. Green*, 20 Ga. 386.

Attachment and Garnishment, from Floyd county. Decided by Judge HAMMOND. August Term, 1857.

On the 24th December, 1856, Hoskins, Huskill & Co. sued out an attachment against Johnson & Garrett, and garnished Cothran and Sloan, who were served with a summons of garnishment on the evening of 24th Dec. (Cothran served

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with a copy 20 minutes past 5 o'clock, P. M., and Sloan 40 minutes past 5, P. M.)

Cothran & Sloan answered that on the 23d December they received on consignment from John G. Garrett, one of the firm of Johnson & Garrett, 25 bales of cotton, and on the same day advanced to Garrett \$480 00₀₀ on said cotton. On the 24th, the next day, they sold the cotton, and after deducting freight, drayage, mending and commissions for selling, and the amount advanced, left in their hands the sum of \$677 37, belonging to Garrett.

This answer was verified by the oath of "A. M. Sloan, one of the firm of Cothran & Sloan", 13th February, 1857.

On the 24th December, 1856, the Planters Bank of Savannah sued out an attachment against John G. Garrett, and summons of garnishment issued directed to A. M. Sloan. Upon this attachment the Constable returned that he had served Sloan with a summons of garnishment at 4 o'clock in the afternoon of 24th December, 1856. Also, levied on 25 bales of cotton. Also, 5 bales marked T., 4 o'clock 24th December, 1856. Marked "25" on each bale, 11 o'clock, A. M., 25th December, 1856, pointed out by Underwood & Smith, pl'ff's att'y.

SAM. JOHNSTON, T. C.

Served Sloan & Cothran with a summons of garnishment on the within attachment, 3 o'clock in the evening, Feb. 13, 1857.

SAM. JOHNSTON, T. C.

The 5 bales of cotton marked T. levied on, sold 8th January 1857, under order of Court, &c.

SAM. JOHNSTON, T. C.

The attachment of the Planters Bank was upon a draft by Garret, dated 9th Dec., 1856, payable forty-five days after date, to the order of N. J. Bayard, Agent, for \$6031 28, and drawn upon Messrs. Hardwicke & Cook, Savannah. Noted

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for non-acceptance, 22d Dec. 1856. Noted for non-payment 26th January 1857. Protested for non-payment 27th January 1857.

It was agreed by the attorneys for the Planters Bank that the answer of Cothran & Sloan, by A. M. Sloan, in the case of Hoskins, Huskill & Co., should be taken as the answer of A. M. Sloan in the case of the Bank against Garrett.

Judgment was obtained by Hoskins, Huskill & Co. against John G. Garrett, only one of the firm of Johnson & Garrett, at August Term of the Superior Court of Floyd county; and by the Planters Bank against the same at the same Term. And counsel for the Bank moved that the money in the hands of Cothran & Sloan be paid and applied to the judgment obtained by the Bank against Garrett.

Hoskins, Huskill & Co. objected to this order on the grounds,

1st. Because the summons of garnishment was directed to and served upon *A. M. Sloan, individually*, and no summons was issued for or served upon *Cothran & Sloan*.

2d. Because the answer of Cothran & Sloan shows that the fund was held by them as the firm of Cothran and Sloan, and not by A. M. Sloan as an individual.

3d. Because the debt sued on by the Planters Bank was not due when its attachment issued, and the parties failed to comply with the provisions of the statute authorizing attachment to issue on debts not due, and said attachment was therefore null and void.

After argument, the Court ordered the money in the hands of Cothran & Sloan to be applied to the attachment of the Planters Bank, and counsel for Hoskins, Huskill & Co. excepted.

D. S. PRINTUP, for plaintiffs in error.

Underwood, *contra*.

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By the Court.—BENNING, J. delivering the opinion.

The debt which the two competing garnishments were in pursuit of, was a debt due from a partnership composed of two persons, C. Cothran & A. M. Sloan. These persons were both living.

These facts sufficiently appeared upon the face of the proceedings in each garnishment.

One of the two garnishments, that of Hoskins, Huskill & Co., was sued out against the *partnership* of Cothran & Sloan; the other, that of the Bank, was sued out against *Sloan only*.

Which of the two, attached the debt? This is the question.

The situation which the garnishing plaintiff occupies in respect to the garnishee, can be no better than that which the defendant himself occupies in respect to the garnishee. If the case be one in which the defendant himself, if suing the garnishee, could not get a judgment against the garnishee, it is one in which the garnishing plaintiff cannot get a judgment against the garnishee. This must be manifest.

Garrett was the defendant in the bank's suit. Suppose the garnishment against Sloan had been a suit by Garrett to recover the debt, and that in his declaration, he had let it appear that the debt was due from *Cothran and Sloan*, and that Cothran was still living, could he succeed?

"But in the case of defendants, if a party be omitted, whether he be sued upon a personal contract, or as pignor of the profits of a real estate, as in debt for a rent charge, the objection can only be taken by plea in abatement verified by affidavit, unless it appear on the face of the declaration, or some other pleading of the plaintiff, that the party omitted is *still living*, as well as that he jointly contracted, in which case the defendant may demur, or move in arrest of judgment, or sustain a writ of error." 1 *Chitty Pl.* 29.

This, no doubt, is good law; and being so, Garrett could not, in the case supposed, recover of Sloan. It must follow,

that if he could not recover of Sloan in the case supposed, neither can the bank recover of Sloan in the actual case.

Again, there can be no doubt, that if this was a partnership debt of Cothran & Sloan, and Sloan only was sued for it, he might *plead* Cothran's non-joinder in *abatement*, (*Chitty supra.*)

Does not Sloan's answer to the garnishment amount to such a plea? It is on oath; it states that the debt is due from Cothran and Sloan; it is put in for Cothran & Sloan; it represents Sloan, as one of the firm of Cothran & Sloan; when speaking of that firm, it uses language of this sort, "these respondents;" "themselves;" "our;" "they;" "their;" coupled with verbs in the present tense.

Finally, say, however, that this answer was not *intended* by Sloan as a plea in abatement; yet, as it discloses the facts on which such a plea might rest, may not Hoskins, Huskill & Co. avail themselves of it in their competition with the bank? Why would these facts be good, if relied on as such plea in abatement? Only because they are such as to show the debt to be one that, really, is *not due from Sloan*. A debt due from Cothran & Sloan, is a debt which is *not due from Sloan*. But a garnishment against Sloan alone, is a thing that can reach no debt, but a debt due from Sloan. In strictness, then, it would seem that the reason why these facts might be relied on by Sloan as a plea in abatement, is a reason why they may be relied on by Hoskins, Huskill & Co. to show that the bank is not entitled to judgment against Sloan, and that they, Hoskins, Huskill & Co. are.

[1.] Upon the whole, then, we think that the debt owed by Cothran & Sloan was not attached by the garnishment of the bank, which was against Sloan only; and was attached by the garnishment of Hoskins, Huskill & Co., which was against Cothran & Sloan.

Consequently, we think that the judgment of the Court below, ordering the money held by Cothran & Sloan, to be paid to the bank, was erroneous.

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This money was due to *Garrett*, not to Johnson & Garrett. And the suit of Hoskins, Huskill & Co. was against Johnson & Garrett, while that of the bank was against Garrett. Still this fact does not help the latter suit. Its garnishment being against Sloan, instead of being against Cothran & Sloan, that suit never attached the debt at all. The question, therefore, as to whether, when there is a debt against a partnership, and a debt against one of the partners, the former debt is to share equally with the latter in this partner's separate property, cannot arise.

I may remark, however, that according to *Dennis vs. Green*, (20 Ga. 386,) the two debts are to share equally in the partners' separate property.

[2.] A partner's *separate* property is bound alike by all judgments against him, whether they be judgments against him as an individual, or judgments against him as a partner. And therefore, it must follow, that both kinds of judgments will share equally in the proceeds of his *separate* property. But as to the proceeds of the partnership property, the case is different. There is in respect to this property, an equity among the partners themselves that requires the property to be applied first to the payment of the *partnership* debts. And, practically, this equity works in such a way as to give debts against the partnership a preference over debts against a partner, in respect to that partner's interest in the partnership effects. I mention this distinction because it was not adverted to in the decision of *Dennis vs. Green*, (*supra*) and because the reasoning on which that decision goes, implies, that the distinction does not exist. The reasoning is wrong; the decision, however, is right; the case was one involving the disposition of the *separate* property of a partner.

Judgment reversed.

Hubbard vs. Price and Jennings.

WM. HUBBARD, plaintiff in error, vs. PRICE and JENNING,
defendants in error.

An insolvent debtor was entitled, in right of his wife, to a share in her father's estate, the share being in the hands of the executor of that estate; it was agreed between him and his wife, and the executor, that the share should be paid over to her as her separate property, to be placed by her in the hands of a trustee. This agreement was executed.

Held, That if the share was not more than enough for a suitable provision for the wife, this arrangement was valid, and the fund was not subject to the husband's debts.—LUMPKIN and BENNING, J. J.

Fraudulent schedule of insolvent from Newton county,
Decided by Judge CABINESS September term, 1857.

This was issue of fraud made up on the schedule which had been filed by William L. Hubbard under the insolvent debtor's act. In this schedule was the following entry: "Money received of the executors of Charles M. Berry by my wife and in her own right and paid over by her for the sole and separate use of herself and her children into the hands of Woodson H. Berry, trustee, principal and interest, up to date \$848."

The plaintiff introduced William T. Berry, who testified that he was the executor of Charles M. Berry, deceased; that as said executor he paid over to defendant's wife, the daughter of the deceased, about \$800, part Christmas a year ago, and part Christmas before; and that at the time he paid it to the said defendant's wife, he took from her a receipt which was written in Covington and sent to the defendant to Atlanta; and after he had signed it it was handed to witness by the defendant's wife; the witness then paid the money to defendant's said wife, it being the amount coming to her from the estate of her father.

Defendants' counsel proposed to ask this witness if the defendant did not uniformly, before said money was paid to his wife, always refuse to receive said money. The plaintiff objected to this question being put to the witness, and

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the Court refused to allow it to be put as illegal, and the counsel for defendant excepted.

Defendant's counsel then proposed to prove that before said money was paid over, the defendant refused to take it because it belonged to his wife and children; but the Court ruled that nothing could be proved on the subject except what was said by the defendant or the executor at the time of the payment of the money; to which ruling of the Court defendant's counsel excepted.

Defendant's counsel then asked what was said by said defendant as to receiving the money before said receipt was handed to him. This question was objected to, and the Court overruled the same, and defendant's counsel excepted.

Counsel for defendant asked the Court to charge the jury "that if the schedule of the defendant fairly apprise the creditors of the nature of the assets, so as to enable them to hunt them up and do all in his power to place the effects in the knowledge and power of the creditors, that is all the law will require of an insolvent debtor in cases where the effects are not in possession of the defendant."

The Court refused so to charge, but charged the jury "that when defendant's wife received the money from the executor of her deceased father's estate, it vested in her husband *eo instanti*, and her possession was his possession. If the plaintiff was indebted at that time, any engagement made or permitted to be made by him to secure the money so received through his wife to and for her separate use, was a fraud upon his creditors. There was a process by which his wife's equity to the separate use of the money coming to her from her father's estate could have been asserted and maintained; but failing to use that process when she received the money, his marital right attached, and it became his property; and if the jury believed, from the testimony, that he was indebted at that time, and that he settled it upon his wife, or permitted arrangements to be made for that purpose

by placing it in the hands of a trustee, that was a fraud upon his creditors, and the jury should so find. But if he was not indebted at the time his wife received the money, he had the right to settle it upon her free from his future debts; and if such was the fact, the jury should find for the defendant. As they might believe the fact from the testimony, so they should return their verdict, and by it say whether or not the defendant had made a fraudulent return of his effects in his schedule. It was simply a question of fraud or no fraud. If they believed, from the testimony, that the defendant had made a fraudulent return of his effects in his schedule, they should find the issue in favor of the plaintiff; otherwise in favor of the defendant."

To this refusal to charge, and to the charge so given, defendant's counsel excepted.

The jury found a verdict for the plaintiff, and the Court ordered the defendant to be imprisoned until he made a full and fair disclosure of all his effects.

To this decision of the Court the defendant's counsel excepted, and filed his bill of exceptions, saying that the Court erred:

1st. In refusing to allow defendant to prove by the executor that he had uniformly refused to receive the money before it was paid to his said wife.

2d. In refusing to allow defendant to prove by said executor that before said money was paid over, defendant refused to take it because it belonged to his wife and children.

3d. In holding that the receipt given could not be explained, and that nothing could be proven on the subject except what was said by defendant or executor (witness) at the time of the payment of the money; also in refusing to allow defendant to prove what was said by defendant's wife as to receiving said money before said receipt was handed to said executor (witness.)

4th. The Court erred in its general charge upon the subject as to defendant's sayings.

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5th. The Court erred in refusing to charge as requested by defendant's counsel.

6th. The charge of the Court as given was error and contrary to law.

HAMMOND and SON for plaintiffs in error.

CLARK and LAMAR, *contra*.

By the Court.—BENNING, J. delivering the opinion.

The money (\$848) came from the estate of the father of the debtor's wife. It was, therefore, a fund out of which she was entitled to a suitable settlement; and a Court of Equity would, on her application, have compelled the debtor, her husband, willing or unwilling, to make the settlement. This is undisputed.

Men may do of their own accord, whatever a Court of Equity, any Court, would compel them to do. That this is true, as a general principle, nobody denies.

Does not this case fall within it? Why not?

The creditors of the husband can have no cause of objection; the credit they gave was not given on the faith of this fund. Consequently, should they get the fund they would get more than they bargained for.

The husband does not object; he consents.

The creditors and the husband are all that could object.

To require the wife to go into equity, would be merely to cause a good part of the fund to be consumed in litigation; one of the poorest uses to which it could be put.

There does not seem to be any reason, then, why this case should not fall within the general principle. And Judge Lumpkin and I think that it does fall within the general principle.

He and I think, then, that if this fund was not more than enough for a suitable provision for the wife, and if it was by the executor turned over to her for her separate use, and

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was by her placed in the hands of a trustee, with the consent of her husband, the fund became one well settled to her separate use; and, therefore, one not subject to her husband's debts.

It follows that Judge Lumpkin and I think that the charge of the Court was erroneous.

But if it be true that it was lawful for the husband to *consent* to this arrangement, it must be true, that he had the right to prove that he had consented to it. And what better way of proving that, was there, than that of proving that he said, he had consented to it? I know of none. If this be so, it follows, that the Court below erred in ruling out the sayings of the husband.

Judge McDonald doubts the foregoing conclusions of the other two members of the Court; but he thinks, that the schedule made a full and fair disclosure as to this fund, so as to enable the creditors to pursue it if they should think fit to do so, and that more than this, was not required of the debtor. "Leaving the question open, as to whether under the facts disclosed, the wife may not enforce her equity as to the money received from the executor of her father's estate, between her and her husband, and her husband's creditors."

All three of us then, think, that the judgment of the Court below ought to be reversed.

Judgment reversed.

Holmes vs. George & Scott.

VIVIAN HOLMES, plaintiff in error, vs. **JAMES R. GEORGE**
and **MATTHEW M. SCOTT**, defendants in error.

A denial of the allegations of a bill, if the denial be founded merely on information and belief, will not justify the dissolution of the injunction, especially when the case is one in which, irremediable loss might result from the dissolution.

In Equity from Troup County. Decision by Judge BULL,
at May Term, 1857.

On the 15th day of February, 1856, James R. George for the use of Matthew M. Scott, brought his action of debt against Vivian Holmes, returnable to Troup Superior Court, May Term, 1856, founded on a promissory note made by said Vivian Holmes, on the 12th December, 1851, whereby he promised on the 25th of December, 1852, to pay to James R. George, three hundred and twenty dollars for value received.

On the 14th of April, 1856, said Holmes filed his bill in equity, praying an injunction against said action at law. The bill states that in the month of December, 1851, Holmes and George entered into partnership in the county of Pike, in a Steam Mill. That the capital stock amounted to \$5,000, of which Holmes paid his half. There was no written agreement, but it was agreed by parol that Holmes and George would run the mill and use the partnership property together on equal terms, sharing equally the profits and losses. George at his own request, kept the books and conducted the business. He agreed to do this without pay. Holmes dealt with him in great trust, and left the business entirely to his management. Holmes does not know positively what it yielded as a net profit only by the declarations of George and from information obtained from men who were engaged there. The mill was located near the Plank Road, 16 miles from Griffin then a rapidly growing city, surrounded by a large quantity of excellent timber; saw mill was capable of saw-

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ing 4,000 feet per day, and grist mill of grinding 50 bushels of corn per day, under proper management. There was a good run of custom to the corn mill, sufficient to keep it running; ready sale existing for it and lumber. Corn was worth \$1 per bushel; lumber was worth at least \$1 per 100 feet, and three-quarters of what was sawed, \$1 25 was below market price. Said George told Holmes the mill cleared net \$40 per day, led him to believe so; and that it yielded that amount per day during the time they worked it. Holmes alleges from this and other information, that it made \$40 per day, or should have done so, inasmuch as under proper and judicious management, it was capable of that result, and said George was liable by his contract and agreement to make it yield that much.

The partnership lasted and continued from 12th December 1851 to 20th May 1852; five months and a few days, and the net profits for which said James R. George was liable, after deducting and making allowance for casualties, bad weather, etc. was \$3,000.

George managed the partnership affairs carelessly, let the mill get greatly out of repair, and squandered and sequestered the partnership assets, &c. scattering tools, appropriating to himself the hogs, sheep, &c. and permitting the stock to stray off, and much valuable machinery to be broken up, thereby under his agreement, rendering himself liable to the partnership \$3,000. The exact amounts are not given above. Owing to the peculiar trust and confidence of Holmes in George, he does not know, but the facts are in the knowledge of George, and Holmes has no means of knowing, unless by resorting to the conscience of George.

George is utterly and hopelessly insolvent. He has gone to parts unknown, even after diligent enquiry. He has no property in Georgia.

Holmes further states, that he has already been compelled to pay and has paid large sums of the debts of the partnership, amounting in all to \$500, (for which an exhibit is pre-

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sented,) and for which James R. George is liable to said Holmes, as they were for the contracts of George for himself, to which he signed the firm name, and which were paid by Holmes before the fact was discovered.

Holmes then refers to the suit, and says it is founded on a note payable to James R. George alone, and not transferable, and which said partnership note was subject by said partnership agreement to be settled on the final account to be taken between said Holmes and James R. George, and which said note was given, in pursuance to said partnership agreement.

George is indebted to Holmes on a final settlement of the partnership, a sum greatly exceeding the amount of the promissory note, and owing to his insolvency, and his having left the State, if he is permitted to collect the money, it will work great and irreparable injury to Holmes.

Holmes has often demanded a settlement, and proposes to pay any balance that may appear against him.

Alleges combination with Matthew M. Scott and others.

At May Term, 1856, complainant took an order to perfect service on George by publication. This he did.

At November Term, 1856, he took the usual rule. At May Term, 1857, George being in default and having filed no answer, he took an order granting leave to him to file a statement of such facts as he believed George knew and would swear to, and taking the bill *pro confesso* against him.

On the 8th December, 1856, Matthew M. Scott filed his answer. Admitting the partnership; that the note was not transferable; that Scott is out of the jurisdiction, and has no property in Georgia:

Denying that the mill made \$40 per day on information and belief; that George managed it alone, or that George owes Holmes a cent on a settlement.

Denies, that George is insolvent, but declares he is solvent and lives in Texas.

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Denies combination with George; says he bought the note before the partnership was dissolved; that after the purchase, Holmes promised to pay him the note provided he would grant him indulgence; that he granted the indulgence.

Denies, that the note was subject to be settled on the final account between the partners.

Denies, that Holmes ever made any tender or offer to George.

Denies any proposition to settle ever having been made by Holmes.

Upon the coming in of the answer, the defendant, Matthew M. Scott, moved to dissolve the injunction.

The Court sustained the motion, and dissolved the injunction, and counsel for complainant excepted.

B. H. BIGHAM, for plaintiff in error.

B. H. HILL, *contra*.

By the Court.—BENNING, J. delivering the opinion.

The bill states, that the partnership lasted over five months, and that the net profits of the partnership business, were \$40 per day. The answer does not deny these statements, except on information and belief; and a denial of the allegations of a bill, if the denial be merely on information and belief, will not justify the dissolution of the injunction, especially if the case be one in which, such dissolution might work irremediable mischief. This is such a case, for Holmes has left the State.

These statements being taken as true, there is equity in the bill.

It was argued for the defendant, that the matters of set-off pleaded in the bill, came into existence after the note was transferred by George to Scott, and that, therefore, they were not good against Scott.

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But, first, this argument rests upon a statement in the answer, not responsive to any thing in the bill; and secondly, the note is without words of negotiability; is it not one, therefore, in respect to which, Scott cannot have a better position than George's was.

We think that the Court erred in dissolving the injunction.

Judgment reversed.

CINCINNATUS M. LUCAS, caveator, plaintiff in error, vs. JAMES M. PARSONS and others, defendants in error.

- [1.] A paper in which it is declared to be the last will and desire of the person who executes it, and in which he revokes all former wills, and leaves his property to be distributed under the laws of Georgia, is a will, and the Ordinary has jurisdiction to admit it to probate.
- [2.] A will disposing of property as the laws of distribution would decide it, is good, and the Ordinary has jurisdiction of it.
- [3.] A contested will may be read to the jury, as the subject to which the evidence is to apply, and the reading it imparts to it no validity.
- [4.] The subscribing witnesses may be permitted to testify that they subscribed the will in the presence of the testator, whether the attestation clause so states or not.
- [5.] When a caveat against a will charges the will to be the result of a special delusion *against the caveator*, the attention of the jury ought to be called specially to that issue.

Caveat to will, in Monroe Superior Court. Tried before Judge CABINESS, at August Term, 1857.

The following paper was propounded for probate before the Ordinary of Monroe county, as the last will and testament of Littleberry Lucas, deceased, to-wit:

STATE OF GEORGIA, CRAWFORD County:.

I, Littleberry Lucas, being of sound and disposing mind

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and memory, do hereby publish and declare this to be my last will and desire, as regards my property, and the disposition of the same. Whereas, I have heretofore made a will, which is now out of my possession, and I cannot obtain the same to destroy it, and whereas, the provisions of said will are not such as I now desire, and would be unjust to some of my children, on account of the large accumulation of money and notes since the date thereof, and all of which are willed to but one legatee, to-wit, my son Cincinnatus Lucas.

Now, I hereby revoke, annul and declare void said will, as well as all or any other wills which I may have made, leaving the distribution of all my property under the laws of Georgia, unless I may hereafter dispose otherwise of the same.

Signed, sealed and published the day and year underwritten.

LITTLEBERRY LUCAS, [L. S.]

Signed, sealed, and published and delivered in presence of the undersigned, as witnesses, this the second day of April, eighteen hundred and fifty-five.

OWEN S. WOODWARD,

JAMES M. SIMMONS,

JOHN ANDERSON,

B. M. HATTON,

ANGUS J. McCUNEY.

Cincinnatus M. Lucas, son and heir-at-law of deceased, and the person named as taking the money and notes in the will revoked, entered his caveat to the probate of the aforesaid paper as the last will and testament of Littleberry Lucas, deceased.

1st. Because the Court of Ordinary of Monroe county has not jurisdiction of the same, deceased being, at the time of his death, legally domiciled in the county of Crawford, in said State.

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2d. Because said paper is void under the law, and is not a will; and because said instrument does not dispose of the testator's estate; and because said paper carries no other estate than what passes under the statute of distributions to the heirs-at-law of deceased.

3d. Because said paper is not a will—it not being testamentary—as appears upon its face.

4th. Because, at the time said paper purports to be executed, said Littleberry Lucas was a lunatic, under commission, and not capable in law of making a will.

5th. Because, at the time of its execution, deceased was laboring under an insane delusion or hallucination as to caveator, and was thereby greatly prejudiced against him.

6th. Because deceased was not of sound and disposing mind or memory.

7th. Because deceased was unduly influenced by the proponders to execute said paper.

8th. Because there is now a suit pending in the county of Crawford, in relation to the subject matter of this proceeding, and to which the parties are the same, which is now on appeal in the Superior Court of said county.

9th. Because said pretended will is void, and ought not to be admitted to probate.

The Ordinary pronounced in favor of the instrument proponded, and ordered and adjudged the same to record and probate, as the last will and testament of Littleberry Lucas, deceased. Whereupon, caveator appealed.

The case was tried upon the appeal, in the Superior Court, and the following bill of exceptions, by caveators, will fully show the decisions, rulings and charges of the presiding Judge, excepted to, viz:

GEORGIA, Monroe county;

Be it remembered that on the first day of September, 1857, during the regular August term of the Superior Court of said county, in the term aforesaid, his Honor Elbridge G. Cabiness,

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one of the Judges of the Superior Courts of this State, then and there presiding, the case of James M. Parsons and wife, Elza Holsten and wife, and Peggy Lucas, propounders of the alleged last will and testament of Littleberry Lucas, late of said county, deceased, against Cincinnatus M. Lucas, caveator, then and there pending on the law side of said Court, and being on the appeal from the Court of Ordinary, came on to be heard, and both parties having announced themselves ready, and a special Jury being empanelled to try the same, the propounders opened their cause to the Jury and were about proceeding to prove the execution of the paper propounded as a will, when caveator's counsel objected to the same upon the ground that the Court of Ordinary had no jurisdiction to prove the said paper, and consequently this Court had not upon appeal, for the reason that said paper was not testamentary in its character, but was simply a declaratory revocation, and that those who took property under it took by descent and not by purchase, that the paper appointed no executor and made no bequest. Which objection, after argument had thereon, was overruled by the Court, and caveator's counsel excepted.

Propounders then offered to prove by Orrin S. Woodward, one of the subscribing witnesses to said paper, that he and the other subscribing witnesses, subscribed the paper in the presence of Littleberry Lucas and at his request, to which said testimony, caveator, by his counsel, objected, upon the ground that the attestation clause of said paper did not show that said witnesses signed the same in the presence of the said Littleberry Lucas, but was in the words following, "Signed, sealed, published and declared in the presence of the undersigned as witnesses," which objection was overruled by the Court and said testimony admitted, to which caveator excepted. After the proof of the *factum* of the paper propounded had been made by four of the subscribing witnesses thereto, propounders then tendered the same and offered to read it to the Jury, when caveator's counsel objected thereto, upon

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the ground that said paper was not testamentary in its character, but was a declaratory revocation, not entitled to probate as a will before the jury, which motion was overruled by the Court and caveator's counsel excepted. A copy of the said paper, together with all the oral and documentary evidence given in the case, is filed with a motion for a new trial in this cause, and is referred to here and made a part of this bill of exceptions. After the testimony was closed on both sides, caveator's counsel requested the Court to charge jury as follows:

1st. That although a person, *non compos mentis*, under guardianship as a lunatic or insane person, may make a will, if he is in fact of sound mind at the time of its execution, yet the fact that he is under guardianship as such lunatic, or insane person is *prima facie* evidence of his incapacity to make a will, and the burthen of proof is on those claiming that he was in a lucid interval; or that he was restored to reason, at the time of the execution of the will, to show that fact.

2d. That great caution is necessary to be observed in examining the proof of a lucid interval, that such proof is extremely difficult, for this among other reasons, viz: that the patient is not unfrequently rational to all outward appearance without any real abatement of his malady.

3d. That where *delusion* exists, and can be called forth on any subject, (it having been first shown by the finding on an inquisition that the alleged testator is a general lunatic,) then he cannot be said to be in a lucid interval, and before such lucid interval can be established, positive proof must be given of the disorder having been thrown off at the time of the alleged execution of the will, and there must be a complete interval of sanity applying to the particular act in question, and if there is any thing sounding to folly it will be conclusive against the presumption of a lucid interval to all legal purposes.

4th. That if Littleberry Lucas was under guardianship as

a person lunatic or insane, at the execution of the paper propounded, then burthen of proof is on those propounding it, to show beyond a reasonable doubt, by clear and satisfactory testimony, that he had both mental capacity and freedom of will and action to make a will.

5th. That in estimating the proof of a lucid interval or restoration to sanity, where permanent proper insanity has once been established by an inquisition, little reliance is to be placed upon the opinions of witnesses, but the Jury should be guided in their judgment by the facts proved and acts done.

6th. That where there is a great change of testamentary disposition and a total departure from former testamentary intentions long adhered to, without any adequate or rational motive or reason for the same, especially if at the time of making the subsequent will, the capacity of the testator is at all doubtful, these are circumstances which go strongly to show that the will is not the act of the testator, and require clear and satisfactory explanation; but such doubt must exist as to the capacity of the testator at the time of the execution of the will.

7th. Undue influence to invalidate a will, varies with the strength or weakness of the testator's understanding; where the capacity is little, a smaller amount of influence will have that effect, especially where the alleged testator is under guardianship as a lunatic; and under such circumstances, excessive importunity or constant annoyance of the testator, on account of association or intimacy with one supposed to be a favorite with and having claims upon his bounty, by either of the propounders, may amount to undue influence.

8th. Papers written by a testator, in the custody of a guardian as a lunatic, subsequently to the paper propounded, though evidence, are to be regarded with jealousy and received with caution, as such a testator is not to be permitted to prove his own sanity; and his subsequent verbal declarations are entitled to no more if to so much force and weight.

9th. That in arriving at the character of the act under con-

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sideration, the terms upon which the testator stood with different members of his family are to be taken into consideration by the Jury

10th. That in determining whether a lunatic under the control of a guardian was restored to sanity, or in a lucid interval, at the time an act was done, the jury are to look to the state of feeling and modes of thinking when sane, and if there is a prolonged departure from such modes of thinking and feeling, this is evidence of insanity; and if at the time of the alleged lucid interval, or restoration to sanity, the state of feeling and modes of thinking are such as are unusual to the individual while in a healthy state of mind, he cannot be said to be restored to sanity or enjoy a lucid interval.

11th. If the lunatic converses intelligently and rationally on those subjects upon which he is most deranged then the jury may consider the lucid interval or restoration to sanity established; but if not, it is otherwise, and the mere fact that he converses intelligently and rationally upon indifferent subjects, affords no sufficient evidence of his restoration to sanity.

12th. That if the jury believed from the evidence that Littleberry Lucas labored under derangement or delusion shortly before as well as subsequent to the execution of the paper propounded, proof of calmness and of doing matters of business is not sufficient to repel the presumption of insanity raised by the inquest of lunacy, and the verdict of the jury declaring him a lunatic.

13th. That the jury are to consider the will of 1845 as evidence in determining the question of the validity of the paper propounded—all of which charge the Court gave in the words and language as requested by caveator's counsel and without any qualification or addition, except the sixth, which the Court qualified by adding thereto, "but such doubt must exist as to the capacity of the testator at the time of the execution of the will," and to which qualification and addition

caveator, by his counsel, excepted. The Court then charged the jury as follows :

In the case now before you, James M. Parsons and his wife, Elza Holsien and his wife, and Peggy Lucas, offer a paper, which they allege to be the last will and testament of Littleberry Lucas, deceased, and propound it for probate. Cincinnati M. Lucas has filed his objections and resists the admission of this paper to record, as the last will and testament of the deceased on the following grounds, viz :

1st. A want of testamentary capacity in the testator, or in other words, that at the time of the execution of this paper as his will, he was not of sound disposing mind and memory.

2d. That it was obtained by the exercise of undue influence on the part of the propounders.

3d. That it was obtained by fraudulent practices on the testator.

These are the grounds relied upon by the caveator to set the paper aside.

The propounders say that the paper offered is the last will and testament of the deceased. The caveator says that it is not his last will and testament, but that it is void on some one or all the grounds relied upon in his caveat—and this is the issue for you to try. Is the paper the last will and testament of the deceased ? Or is it void on either or any of the grounds stated in the caveat ?

The propounders bring the paper into Court and ask that it be admitted to probate and record as the last will of the deceased. It is incumbent on them to show it to be so ; that it was executed with all the formalities required by law ; that it was signed by the testator, and attested by three credible witnesses in his presence and at his request ; that he had capacity to know what he was doing at the time he executed it, and that he executed it freely, voluntarily and without compulsion. It is for you to determine whether such proof has

been made, and if it has, then you will find the paper propounded to be the last will and testament of the deceased, unless it be void on some, or all, of the grounds stated in the caveat.

The Court will explain to you the law applicable to the several objections against the admission of the paper to probate as the last will of the deceased, and it will then remain for you to determine according to the law, as it may be given you by the Court, whether such facts have been proven as are sufficient to set aside the paper as such will.

The first ground of objection is a want of testamentary capacity in the deceased at the time of the execution of the will.

The Court will explain to you what the law considers testamentary capacity, and leave it to you to determine whether the evidence shows the testator to have possessed it at the time he signed the paper before you.

By testamentary capacity is meant a sound disposing mind and memory; that is, the testator must have mind enough to know what he is doing, and memory to recollect what property he has to dispose of, and the persons to whom he wishes to bequeath it. To possess sufficient testamentary capacity to make a will, the law does not require a testator to have the same strength of mind which is necessary to enable him to make contracts, and to transact the ordinary business of life. If he has capacity to know his property, and the persons who are to be the objects of his bounty, that is testamentary capacity, and the law requires nothing more to constitute it.

In relation to the paper now before you, the question for you to consider and determine is: were the mind and memory of the deceased sufficiently sound to enable him to know and understand the business in which he was engaged at the time he signed it. If he had such a mind and memory then he had testamentary capacity; you will look to the testimony and from it determine this question; and you will

look to the time when the will was executed, as the point at which his capacity is to be tested, and you will determine whether at that time he possessed a sound disposing mind and memory. He may not before or afterwards have had such a mind and memory; he may not before or afterwards have had sufficient testamentary capacity to enable him to make a valid will, yet if he had such capacity at the time of the execution of the paper before you, that is sufficient, and that is all the law requires; and his incompetency before or after the execution of the will amounts to nothing, unless it bears upon the time when he signed the paper, and is of such a nature as to show a want of testamentary capacity at that time. That being the point of time to which you will direct your attention to determine the capacity of the testator, you will look to the testimony of the witnesses who attested the will, and of those who were present at its execution; all other things being equal, the law places more reliance upon the testimony of such witnesses, than upon those who were not present, and for the obvious reason that the law considers the attesting witnesses as called upon to examine into and be satisfied of the capacity of the testator to make a will. But the Court does not mean to say that you are to look alone and exclusively to the testimony of the attesting witnesses, and those present at the execution of the will; you will take into consideration the whole testimony of all the witnesses—look to their manner of testifying; their means of knowledge; their skill and capacity to judge in relation to the subject upon which they testify; the relation they sustain to the parties at controversy, and the bias and influence under which their testimony is given; look to all these circumstances, compare and weigh the testimony, and give the preponderance to the side on which the weight of testimony hangs.

And in determining the testamentary capacity of the testator, or the want of it at the time of the execution of the paper, you will also look to and consider all the circumstances attending its execution, in proof before you. You will look

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to his means of knowing the contents of the paper; whether it was written by himself, or dictated by him and written by his directions and in accordance with his instructions; and you are authorized to determine the soundness of the testator's mind from all these circumstances and from his conversation and acts at the time the will was made; and look to the testimony of the witnesses for the facts upon this point.

In the case now submitted to you, the deceased had been declared a lunatic by a Court of competent jurisdiction, and as a lunatic he had been placed under the care and protection of a guardian, and the management of his property confided to such guardian; and at the time of the execution of the paper before you, the letters of guardianship were unrevoked, and the commission of lunacy still in force. When one is declared a lunatic, the burden of proving his restoration to sanity is upon those who assert it. Though the deceased was under a commission of lunacy, yet if he had a lucid interval, if at any time, he was restored to sanity, it was competent for him to make and execute a will, and all acts, done by him during a lucid interval, except such as are forbidden by law, are valid and binding—but the burden of proving the lucid interval, and the restoration to sanity is upon the propounders; and the testimony must be such as to satisfy you, beyond a reasonable doubt, that at the time he signed the will he was restored to sanity, or that he executed it during a lucid interval. The doubt must be a reasonable one, it must not be assumed for the occasion, but must actually exist, and must arise from such a state of facts as to leave the mind in a state of hesitation which side the truth lies. The proof must satisfy you, beyond such a doubt, that the deceased, at the time of signing this paper, was restored to sanity, or did it during a lucid interval, and for such proof you will look to the testimony of the witnesses.

But partial insanity, a delusion on some particular subject, may exist. When such is the case, when the testator is deranged on a particular subject, and rational on all other subjects,

his testamentary capacity is not destroyed, unless the will is the offspring of the delusion under which the testator is laboring, but if the act can be traced to the morbid delusion, and is the act of that delusion, then the act is void.

If the deceased was laboring under a delusion of mind on any subject at the time of the execution of this will, and the will is the result of that delusion, then it is void, though he might have been sane on all other subjects; but unless the will be the result of such delusion, his will is not vitiated by partial insanity or delusion on a subject not affecting his mind when the will was made. A delusion is where one supposes a thing to be true which is not true, and acts in reference to it as though it were actually true, and under a firm belief that it is so.

If you should come to the conclusion, from the testimony, that the testator was incompetent to make a will at the time of the execution of this paper, that will end your deliberations on this case, and you will find in favor of the caveator; but if you should find from the evidence that he was competent and had testamentary capacity, then you will inquire :

2d. If the paper before you was extorted from him by undue influence? And to enable you to determine this question, the Court will instruct you what is meant by undue influence; it is as clearly defined in law as is testamentary capacity; both are so clearly defined that no one can mistake either. What then does the law consider undue influence? It means an influence which amounts to coercion and restraint; an influence which destroys the free action of the testator, and prevents him from disposing of his property as his own will would dictate. It is not the influence arising from arguments, addressed to the judgment and understanding, or arising from considerations operating on the natural affections of a parent; but to be undue, it must be such an influence as constrains the testator to make a disposition of his property without the exercise of any volition on his part—it must destroy his free agency. If the influence amounts to constraint,

and prevents the free action of the testamentary capacity of the testator, then it is undue, and a will obtained by the exercise of such an influence is void—it is not the will of the testator, but the will of the person or persons who exercised the undue influence.

Wherever an improper influence is brought to bear upon the mind of one whose mental capacity is naturally imbecile or impaired by age, intemperance, disease, or from any other cause, proof of the testamentary capacity of such a one, and of the free and voluntary execution of his will, must be clear and strong. If you should believe from the testimony in this case, that such an influence was exerted upon the testator, as constrained him to make a disposition of his property contrary to his free will and desire, then you ought to set it aside; but if no such influence was exercised, then you will find the paper propounded to be the last will and testament of the deceased, unless it be void upon the third ground, viz: That it was obtained from the testator by fraudulent practices. What is meant by fraudulent practices is, deception practiced upon the testator—a fraud perpetrated upon him by which he was deceived and induced to make a will, which, if left to his own free volition, he would not have made, or by which fraudulent practices, provisions were incorporated in his will unknown to him. Such is what the Court understands to be meant by fraudulent practices. If such deception was practiced upon the testator by the propounders, or either of them; if they procured the will to be made by the testator by fraudulent practices—and you must look to the testimony of the witnesses to determine whether such be the case; if the evidence is such as to satisfy you of the existence of such facts, then the will is tainted with fraud and should be annulled.

But fraud is not to be presumed, it must be proved; it must in some way be shown, and when the caveator alleges fraudulent practices on the part of the propounders in procuring this will to be made, it is incumbent on him to

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prove the fraud—the fraudulent practices. But he is not required to prove the fraud by direct and positive testimony. Fraud most usually veils itself in mystery, and it is by circumstances, most usually, that it can be brought to light and detected. It is not for the Court to say whether such circumstances have or have not been proven in this case, it is for you to determine this question. The Court instructs you that you are not to presume fraud, it must be shown by testimony either direct or circumstantial; and if proven by circumstances, these should be strong enough, when combined and examined, to satisfy you beyond a reasonable doubt of the existence of the fact they are adduced to establish. The proof, when circumstantial, must be strong enough to satisfy the consciences and understandings of reasonable men; and the question for you to determine is, whether the testimony, either positive or circumstantial, is sufficient to satisfy your minds and consciences that this will was procured to be made by fraudulent practices on the part of the propounders. If that fact be established by the proof, it is sufficient to annul it and set it aside.

To sum up in conclusion—you are to say, from a careful consideration of all the testimony before you, whether Littlebury Lucas had sufficient testamentary capacity to make a disposition of his property with discretion and understanding at the time he executed this will; if he had such capacity, then secondly, was the will obtained by the exercise of undue influence, and was he under such constraint as destroyed his volition and prevented him from disposing of his property according to his own will and desire. If there was no such influence, then thirdly, was the will obtained from him by fraudulent practices—if not, then the caveator has not successfully attacked the will. These are the questions for you to consider and determine. If he did not possess testamentary capacity at the time he executed the will, it ought to be set aside. And if it was obtained by fraudulent practices on the part of the propounders, or any of them, it

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ought to be set aside; but if none of these grounds exist, then it ought to be established as the last will and testament of the deceased. As you may determine the facts, so let your verdict be rendered.

The jury then retired and brought in a verdict in favor of the propounders, and setting up the paper propounded as the last will and testament of Littleberry Lucas, deceased. Whereupon the caveator moved, during the said term of said first mentioned Court, for a rule *nisi* for a new trial upon certain grounds and for certain reasons mentioned in said motion, which grounds and reasons will fully appear in the transcript of the record accompanying this bill of exceptions and which is made a part hereof, which said motion for a new trial the said Court overruled upon each and all the grounds therein taken; whereupon caveator, by his counsel, excepted; and now on this the 8th day of October, 1857, being within thirty days from the adjournment of said first mentioned term of said Court, comes the caveator and presents his bill of exceptions and says the Court committed error.

The jury returned a verdict for the propounders, whereupon counsel for caveator, during the said term and before the adjournment thereof, moved for a new trial in the said cause on the following grounds:

1st. Because the Court erred in holding the paper propounded was testamentary in its character and entitled to probate.

2d. Because the Court erred in allowing the paper propounded to be read in evidence to the jury and in overruling caveator's objection thereto; that the Court had no jurisdiction over it, it not being testamentary in its character but a declaratory revocation, and that the persons who took under it took by descent and not by purchase.

3d. Because the Court erred in allowing the subscribing witnesses to said instrument to testify that they signed in the presence of the alleged testator and in overruling caveator's objection thereto, viz: that the attestation clause to said instrument does not recite or contain the fact that said witness-

es signed the same in the presence of the said Littleberry Lucas, but in the words following: "Signed, sealed, published and declared in the presence of the undersigned as witnesses,"

4th. Because the Court erred in charging the jury that by testamentary capacity was meant that the testator had mind enough to know what he was doing and memory to recollect what property he had to dispose of, and the persons to whom he wished to bequeath it—to possess sufficient testamentary capacity to make a will, the law does not require the testator to have the same strength of mind which is necessary to enable him to make contracts and transact the ordinary business of life; if he had capacity to know his property and the persons who were the objects of his bounty, that was testamentary capacity, and the law required nothing more to constitute it.

5th. Because the Court erred in charging the jury that in relation to the paper before them, the question for them to consider was, were the mind and memory of the deceased sufficiently sound to enable him to know and understand the business in which he was engaged at the time he signed; and if he had such a mind and memory, then he had testamentary capacity; that they would look to the testimony and from it determine the question; and that they would look to the time when the will was executed as the point at which capacity was to be tested, and they would determine whether at that time he possessed a sound disposing mind and memory, he might not before or afterwards have had such a mind and memory; he might not before or afterwards have had sufficient testamentary capacity to enable him to make a valid will, yet if he had such capacity at the time of the execution of the paper before them, that was sufficient, and that was all that the law required; and his incapacity before or after the execution of the will amounted to nothing, unless it bore upon the time when he signed the paper, and was of such a nature as to show a want of testamentary ca-

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capacity at that time, that being the point of time to which they would direct their attention to determine the capacity of the testator, and in requiring the jury to look to the testimony of the witnesses who attested the will and those who were present at its execution, and that other things being equal, the law placed more reliance upon the testimony of such witnesses than upon those who were not present, and for the obvious reason that the law considered the attesting witnesses as called upon to examine into and be satisfied of the capacity of the testator to make a will; that the Court, did not mean to say that you are to look alone exclusively to the testimony of the attesting witnesses and those present at the execution of the bill, but that the jury were to take into consideration the whole testimony of all the witnesses, to look to their manner of testifying, their means of knowledge, their skill and capacity to judge in relation to the subject matter upon which they testify, the relation they sustain to the parties at controversy, and the bias and influence under which their testimony is given; to look at all these circumstances, to compare and weigh the testimony, and give preponderance to the side on which the weight and testimony might hang.

6th. Because the Court erred in charging the jury that if fraud was proven by circumstances, these should be strong enough, when combined and examined, to satisfy them, beyond a reasonable doubt, of the existence of the fact they were adduced to establish; that the proof, when circumstantial, must be strong enough to satisfy the consciences and understandings of reasonable men; and the question for them to determine was, whether the testimony, either positive or circumstantial, was sufficient to satisfy their minds and consciences that the will was procured to be made by fraudulent practices on the part of the propounders.

7th. Because the Court erred in qualifying the following charge requested by caveator's attorneys, viz: "That when there is a great change of testamentary disposition and a to-

tal departure from former testamentary intentions long adhered to, without any adequate or rational motive or reason for the same, especially if at the time of making the subsequent will the capacity of the testator is at all doubtful, these are circumstances which go strongly to show that the will is not the act of the testator and require clear and satisfactory explanation," by adding thereto, "but such doubt must exist as to the capacity of the testator at the time of the execution of the will," and in not giving the same in the words and language of caveator's counsel in writing without qualification or addition.

8th. Because the verdict is contrary to law and equity.

9th. Because said verdict is contrary to the evidence, and decidedly and strongly against the weight of evidence.

Which motion for a new trial was overruled by the Court and caveator's counsel excepted. And counsel for caveator on this 8th day of October, being within thirty days from the adjournment of the said term of the said Court, tenders his bill of exceptions and says the Court erred:

1st. In overruling his demurrer to said paper propounded as a testamentary paper, and in admitting the same in evidence to the jury and overruling caveator's objections thereto.

2d. In allowing the subscribing witnesses to prove that they signed the paper propounded in the presence of Littleberry Lucas and at his request, and in overruling caveator's objections thereto.

3d. In refusing to grant a rule *nisi* for a new trial, and in overruling each and all the grounds therein taken.

And as the facts aforesaid do not appear of record, the said caveator prays that the foregoing may be signed and certified as his bill of exceptions in said cause, according to the provisions of the statute in such case made and provided.

PINKARD & STEPHENS; G. R. HUNTER; G. R. CULVERHOUSE;
MILLER & HALL, for plaintiff in error.

R. P. TRIPPE; POE & GRIER; and G. W. NORMAN, *contra*.

By the Court.—McDONALD J., delivering the opinion.

This cause was tried in the Superior Court of Monroe county. Several points were made during the progress of the trial, the decisions of which by the Court below, were excepted to by counsel for the caveator of the will, and after a verdict in favor of the propounders, they were incorporated, with other grounds, in a motion for a new trial.

The Court refused the motion, and his judgment thereon is assigned as error. As we put our judgment on a single point, it is scarcely necessary to go into an elaborate consideration of all the grounds presented in the record. We will, however, advert to them in a manner to narrow the points of controversy between the parties, on a future trial.

[1.] It is first objected that the Court erred in holding the paper propounded to be testamentary in its character, and entitled to probate. The paper propounded is short, but the whole tenor of it is testamentary. The testator, for we may call him so, declares it to be his last will and desire as regards his property, and the disposition of the same. It is true, that this declaration alone would not constitute it a will; but, taken in connection with its contents, it is entitled to much consideration. He proceeds to say that he had theretofore made a will, which was out of his possession, and he could not obtain the same to destroy it. Here is indicated strong dissatisfaction with a will which he had made, and his wish to cancel it. He assigns a good reason for desiring to cancel it; that it would be unjust to some of his children, as he had, by that will, given all his money and notes to one legatee, and they had largely increased since the date of it. He revokes and annuls that will, and any other will which he may have made. He leaves his property to be distributed under the laws of Georgia, reserving to himself the right to dispose of it thereafter.

His will, as it then was, was not such as he desired it to be. It was unequal. One of his children would, by the ac-

mulation of money and notes, since it was written, have considerably more than the rest, which would be unjust. He revokes that will, leaving his property for distribution under the laws of Georgia. It was the same as if he had said, "I leave my property to be equally divided amongst my wife and children." It was a bequest of his entire estate to his wife and children. They were legatees, therefore, and the paper was a will. It disposes of his property differently from his first will. It is said, however, that the paper is inoperative as a will, because it disposes of the entire estate precisely as the law would distribute it, and the heirs-at-law, in such case, take by descent, and not by purchase, that is, under the will.

[2.] The reason of the rule in England, to that effect, does not apply in this State. It was adopted in that country in favor of the Lord for the preservation of his tenure, and of creditors for the preservation of their debts. 1 *Powell on Dev.* 421. In England, an estate in chattels is not transmissible to the issue, and is incapable of any kind of descent. *Knight vs. Ellis*, 2 *Brown Ch. Rep.* 578. Chattels go to the executor or administrator, and are held in trust by them, first for creditors, and then for those entitled under the will or the statute of distributions. In this State, there is no distinction in respect to the payment of debts, between real and personal estate, except that real estate must not be so applied, until the personalty is exhausted, and then only by making it appear that it is for the benefit of the parties interested that it should be sold. Hence, the lands as well as personalty go, in this State, to the executor or administrator, for the payment of debts, and creditors are not driven to a proceeding against the heirs-at-law for the recovery of their debts, after exhausting the personal assets. There is, therefore, no reason for the rule contended for, and a will embracing real and personal estate, here, is just as good as a will of personalty to the same purport would be in England. There are many reasons why a will of this sort should be sustained. But

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is unnecessary to encumber this opinion with them. We think that the paper is testamentary in its character, and that the Court of Ordinary had jurisdiction over it.

[3.] The Court acted properly in submitting the paper to the jury. It was not a case in which the paper was relied on as evidence of title; but it was itself the subject of the suit, and the questions were on the paper, whether it was the will of the deceased, made and executed by him under circumstances which entitled it to probate as a will. On such an issue, the instrument should be presented to a special jury, precisely as it is to the Ordinary, whose duty it is to pass upon it primarily. The reading it to the Ordinary, or to the jury, gives it no validity whatever. It only discloses the subject to which the testimony is to apply, and in many cases, it is necessary to a correct application of the testimony, by the mind of the Court or jury, that the instrument should be before them. The result depends almost entirely on the testimony, extrinsic of the will, and its contents are seldom, I may say, perhaps, never, considered when extraneous evidence makes out a clear case of capacity and uninfluenced testamentary intention.

[4.] The subscribing witnesses were allowed to testify that they subscribed in the presence of the testator. This testimony does not *contradict* the attestation clause and the Court below committed no error in admitting it.

We overrule all the grounds of special exception made in the record to the charge of the presiding Judge to the Jury. We think that he laid down the law fairly and accurately, and quite as favorably to the caveator as he was entitled to have it, as far as he went, and it was a very full charge, with one exception. Indeed, the exception to the charge, set forth in the 7th ground of the motion for a new trial, is not borne out, by the evidence given on the trial. It is too much to assume, that the paper propounded as a will showed a total departure from former testamentary intentions ~~long adhered to, without any adequate or rational motive or reason for the~~

same, when the testator had expressed dissatisfaction with his former will, before he became deranged, to as many as three witnesses, Woodward, Jackson and Banks, and assigned to some of them very good reasons for desiring to make a new will. This request was very strong in favor of caveator, and it was given in the language of the request; but the exception is to the remark made by the Court to the jury, "but such doubt must exist as to the capacity of the testator, at the time of the execution of the will." This addendum of the Court is identical, *in substance*, with the charge as requested, and as it was given, unless a distinction is drawn between the "*making*" and the "*execution*" of the will; and if there be any distinction, the Court was correct in its explanation in confining the doubt to the time of the *execution* of the will.

The 4th ground in the motion for a new trial, is a general exception as to the meaning of the terms "testamentary capacity" as applicable to this case.

[5.] One of the grounds in the caveat, is "that at the time of the execution of the will the testator was laboring under an insane delusion or hallucination, as to *caveator*, and was therefore greatly prejudiced against him."

The charge of the Court was, that if the deceased was laboring under a delusion of mind, on any subject, at the time of the execution of the will, and the will was the result of that delusion, then it is void, though he might have been sane on all other subjects; but unless the will was the result of such delusion, his will is not vitiated by partial insanity or delusion on a subject not affecting his mind when the will was made. The definition of the term "delusion," is given correctly. But we think, that although the charge of the Court was correct as to the effect of delusion generally, yet as the caveat charged the will to be the result of a special delusion *against the caveator*, the attention of the jury ought to have been called specially to that issue. The deceased had been a lunatic. This was conceded on all hands. His lunacy

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was not traceable to any fact or circumstance connected with the caveator, but when in that condition, it is manifest that he was impressed most unfavorably towards him, and apparently without adequate cause. If he was subsequently restored to his reason in all respects, except as to the feeling towards his son, conceived when in an insane state of mind, and if he continued to suppose, that his conceits, formed when in that condition, were true, when they were not true, and if he acted in making his will as if they were true and under a firm persuasion that they were true, and the will was the result of that delusion, it ought not to stand. But, on the other hand, if the deceased, before his derangement, had intended to make another will, and had made that intention known, and the will, made, is in conformity to such declared intention, a mere resentment against his son not amounting to a delusion will not vitiate the will. We think, however, that these things ought to have been submitted to the jury so that their minds might have been brought to act upon them.

There is some evidence on both sides of the proposition, and we think that the mind of the jury ought to have been directed by the Court specially to the question whether the will was the offspring of delusion or the result of antecedent intentions of the deceased when he was unquestionably sane. Because it was not done so explicitly as in our judgment it ought to have been done, we reverse the judgment of the Court below and order a new trial.

In regard to the other grounds in the motion for a new trial, I will say that my brother Benning entertains a very decided opinion that the verdict of the jury is contrary to the evidence in the case. He thinks that it was not sufficiently established that the will was executed during a lucid interval; that the weight of the evidence is decidedly against it; and, further, that in the weak condition of the mind of the deceased, the evidence justifies the conclusion, that the will was the result of undue influence. This, however, is not the

judgment of the Court. While my brother Lumpkin's mind inclines to a concurrence with brother Benning, in his view of the case, he does not so strongly coincide with him as to warrant him in putting his judgment on that ground.

It is with great distrust of my own judgment that I ventured to differ with my brethren in matters of law or fact, but I must say that I differ from them in this instance. If the son had been disinherited by the father, I should most unhesitatingly have concluded that an act so inconsistent with the strong affection and partiality of the deceased, expressed through his life, when he was unquestionably sane, for his obedient and faithful child, must have been the offspring of a disordered mind, or of a sinister and over-powering influence.

But such is not the case. He is put on a footing of equality with other children of the testator. There is evidence of the declarations of the testator, when there was no question of his sanity, that he intended to make just such a will, with the exception that no mention was made of his wife. But it is not to be presumed that he intended to disinherit her. There is evidence on both sides of the question, of a lucid interval at the time of the execution of the will, which, together with all the testimony in respect to extrinsic influence exerted over the testator, was submitted to the jury. The will is in accordance with the natural affection and parental duty of the deceased. These are circumstances which bear strongly on my mind, in forming a judgment in this case.

On the other hand, it is said, and I admit that it is entitled to much consideration, that there are provisions in the first will which are not found in the last, and which seem to have been favorite projects with the deceased. First, to make his grand-children as nearly equal as possible; and secondly, to secure to the separate use of his married daughters the property he gave to them. But his intention, in that respect, may have undergone a change, and this discrepancy in the

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provision of the wills is not to be imputed to lunacy at the time the last was executed.

These matters are all to be reviewed by the jury, under the exposition of the law by the Court, and we have said as much as it is proper to say under these circumstances.

Judgment reversed.

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EDMUND RAINES, plaintiff in error, vs. SAMUEL P. CORBIN
and wife, defendants in error.

MCDONALD, J. dissenting.

The land in controversy having been purchased by the testator after the making of his will, did not pass by it. Notwithstanding the strong expressions in the will, that the devise and bequest of property real and personal to his wife, should be in lieu and bar of dower and of the usual allowance to widows for their year's support, in lieu and in bar of all other claims on the testator's estate, in any manner whatever, yet the land purchased by the testator after the making of the will, necessarily passed to her as his heir at law. It is in vain to search the will for a provision which looks to the purchase of lands, or the disposition of after purchased lands. It is not to be found there. The title was obliged to go, on the death of the testator, where the law cast it. "If a man devises real estate to J. S. and his heirs, and signifies or indicates his intention, that if J. S. die before him, it should not be a lapsed legacy, yet unless he had nominated another legatee, the heir at law is not excluded, notwithstanding the testator's declaration." *Sibley vs. Cook*, 3 *Atk.* 572. If, in this case, the heir at law does not take the land, where does it go? It cannot go to the brothers and sisters, as devisees,

* The dissenting opinions in this appendix, were not in the Reporter's hands at the time it was necessary to put the cases to press.

because it is not given to them. It cannot go to them as heirs at law, because they are not heirs at law. It is not like an election between a bequest or devise under a will given in lieu of dower, and the dower which vests in the widow on the death of her husband. Such provisions are usually made by testators, either in favor of their heirs at law or a devisee of land. The testator cannot defeat the wife's right of dower, against her will; hence, when he does what he can towards it by giving her something expressed to be in lieu of it, she must make her election, for she cannot take both. But there is no devise over of the land in this case to any one, and she is herself the heir at law. If the testator intended, as he probably did, that the widow should have no more of his estate, real or personal, than he had bequeathed or devised to her, whether acquired subsequently to the making the will or not, he has not so framed his will as to give effect to such intention. He ought to have so written his will as to have disposed of land subsequently purchased by him. The doctrine of election cannot apply to the case.

But it is alleged that the widow had the land examined with a view to purchase it at the executor's sale, and that her agent attended the sale for the purpose of bidding for it. This is evidence, that she supposed, as a matter of fact, that she had no title, and that the title was in the executor for the benefit of the other devisees. This was certainly not so. If she acted in ignorance of her rights, it certainly cannot be imputed to her as a fraud. In fact, the purchaser, who was a devisee under the will, had the same opportunity of knowing the facts of the case, as the widow, and he is to be presumed to have purchased under the same mistake as to the title that the widow did, and to have purchased a bad title with no evil intention. He purchased and paid for the land, and made improvements thereon, supposing that he had an absolute title to it, and knowing also, that no adverse claim was set up to it by the person now claiming to be the owner, who knew of his purchase and improvements. The bill

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ought, under these circumstances, to be retained, and the defendants required to answer, for the purpose of inquiring into the purchaser's right to have his purchase money returned, and to be paid for improvements made in good faith.

[See judgment in this case, at page 185.]

JOHN and NANCY BOWEN, plaintiffs in error, vs. **JOHN SLAUGHTER and AMOS BROWN**, defendants in error.

MCDONALD, J., dissenting.

John Bowen and Nancy Bowen filed their bill in chancery against John Slaughter and Amos Brown, praying that tract of land number eighty-two, in the thirty-first district of the county of Lee originally, but now of the county of Marion, may be decreed to be their land, and that the defendants may be compelled to account for the rents of the same. The bill alleges, in substance, that Alford Bowen, the father of John Bowen and the husband of Nancy Bowen, while in life, in July, 1825, resided in Stokes District in the county of Morgan, and was, by virtue of certain acts of the Legislature, entitled to two draws in the land lottery for distributing the lands then lately acquired from the Creek tribe of Indians, and that he gave in for two draws in said lottery, to the receiver of the names of persons entitled to draws therein, in Stokes District, in said county, that the said receiver of names made a mistake in entering his name, or in transcribing it in the book sent to the Executive Department, and entered for his name the name "Alford Brown." The bill further alleges that the name "Alford Brown" drew lot of land number eighty-two in the thirty-first district of the county of Lee originally, but now of the county of Marion, and that a grant was issued in the name of the said Alford Brown for the same, on the 22d day of November, 1837.

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The bill alleges, further, that at the time of giving in names for draws in said land lottery, no person resided in said Stokes District or the county of Morgan named "Alford Brown," but the said Alford *Bowen* resided there and gave in for draws in said District, that Alford Bowen departed this life while complainant John was quite young, and that neither of the complainants knew anything of the mistake herein stated until within the last twelve months preceding the filing of the bill; and that complainants as well as the deceased Alford Bowen, when in life, supposed that his name had been correctly taken down and that he had drawn nothing; and the bill further charges expressly, that the said Alford Bowen drew the said tract of land by the name of Alford Brown. That all the children of the said Alford Bowen, except the complainant John, are dead without issue; that the land is the property of the complainants. The bill further alleges that they sent to get possession of the land and found John Slaughter, one of the defendants, in possession, who refused to give possession, setting up a claim thereto under a pretended conveyance from one Amos Brown of the county of Morgan, who is the other defendant; that said Slaughter purchased the land from said Amos Brown with a full knowledge of all the facts set forth in the said bill touching the rights of the complainants; and if he was ignorant of the rights of the complainants when he made the purchase, he was fully apprised thereof before he paid for the same, and if he has completed said payment, it has been done on the assurance of the said Amos Brown to hold him harmless against any suit for the recovery of it by the complainants. The bill further alleges that the said Amos Brown on the 22d day of November, 1857, well knowing that the said land was not his, and knowing that said Alford Bowen put in for said draws, and that, but for said mistake of the receiver of the draws aforesaid, the said lot of land would have been drawn by the said Alford Bowen, and knowing that there was no such person as Alford Brown

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in Stokes District, and knowing the ignorance of the said Alford Bowen, while in life, of said mistake made by the receivers, and greatly presuming upon the ignorance of the complainants in respect thereto, and of their remaining ignorant thereof, took out the grant for said lot of land in the name of Alford Brown, and pretended thereafter that the said lot of land was his right and property, as there was no such person in said District as Alford Brown at the time of giving in for said draws. The said bill further alleges that the said Amos Brown not only knew that the said name "Alford Brown" was not put down or transcribed by the said receivers for the name of Amos Brown, but that through mistake on their part, it was put down for the name of Alford Bowen, and was so returned by the said receivers.

The bill further alleges that Amos Brown gave in for but one draw in said lottery, and that as a single man he was entitled to but one, as the exhibit attached to the bill of the returns of the persons giving in for draws in Stokes District shows.

The bill alleges further that the said Amos Brown, by virtue of that draw so given in, drew tract of land No. 24 in the 23d district of originally Muscogee county, and that the said Amos Brown well knew it, for that soon after the drawing was over, on the 27th day of July, 1830, he took out the grant for said land as his own right and property, and still holds the same, if he has not sold it.

The bill further alleges that the said John Slaughter has been in possession of the lot of land number 82 in the thirty-first district of Lee county, and has lived on and cultivated it for four years or other "long space of time," and that the rents and profits are worth one hundred dollars per annum.

The defendants demurred to the bill on five distinct grounds :

1st. That there is no equity in the bill.

2d. Because complainants show that they have no title to the land.

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3d. Because the complainants cannot, in this indirect way, perfect an inchoate title, even if it be true that a mistake occurred, as charged in the bill.

4th. That complainants, by their own showing, have a good and perfect remedy at common law, if they have any right at all.

5th. That complainants, by their own showing, exhibit the fact that the defendant has a good statutory title by a continuous possession under color of title for more than seven years immediately preceding the commencement of said cause in equity.

The Court below sustained the demurrer and ordered the bill to be dismissed. To that judgment the complainants except, and this Court affirms the judgment, from which judgment of affirmance I dissent for reasons which I shall proceed to assign.

This bill is badly drawn. It does not seek to reform the grant, and there is no prayer for general relief. It would, perhaps, have been better, that the Attorney General had been made a party, and there had been a prayer that would have authorized the Court to have made a decree for that purpose or to cancel it. But according to the allegations, of the bill the grant to Alford Brown, no person of that name having resided in Stokes District, Morgan county, at the time of giving in the names of persons entitled to draws, was the same as a grant to a fictitious person and void. There cannot be a valid grant, if there be no grantor except in the cases allowed by the statute.

It is clear that Amos Brown, who assumed to be the owner of the land, was not entitled to it. He was entitled to but one draw in the Land Lottery and he gave in for but one. He drew a tract of land in his own name, and it was granted to him. He could not have been entitled to the land drawn to the name of Alford Brown,

Alford Bowen gave in for two draws in the lottery; but his name does not appear in the schedule of names returned for

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Stokes District—the District in which he resided and gave in. The name “Alford Brown,” appears on that schedule, but no such person resided in the District. These facts being true then, and they must be so considered, the land must have been drawn to a name which had, through the mistake of the person who received the name and transmitted it to the Executive Department, been substituted for that of Alford Bowen; and it is clear that neither he nor his heirs at law should suffer for the mistake of official agents whose duty it was to receive and transmit the names of persons entitled to draw.

Amos Brown was guilty of a fraud in taking out the grant and conveying the land when he must have known he was not entitled to it; and Slaughter, having had notice of all the facts before he completed his purchase, was in no better condition than Amos Brown. Indeed, if he had looked at the grant, he would have seen that Amos Brown had no title, and he is to be presumed to have examined that. On the ground of mistake and fraud, then, a Court of Chancery has jurisdiction. It is objected, however, that the grant cannot be assailed in a Court of Equity.

There is no prayer to set aside the grant, and hence there is no necessity for presenting my views at length for believing that in this State, Courts of Chancery have jurisdiction to correct errors in grants. Courts of Chancery must create remedies for new cases, and while it will not decree against the State, there is no good reason, in my judgment, why it should not give remedies against persons, who have fraudulently obtained the possession of property belonging to others, using for that purpose a grant improperly procured from the State. Because a person obtains a title from the State, for land to which he has no right, why should he not be decreed to be a trustee for the rightful owner, and be compelled to convey, in the same manner as if such fraudulent title was obtained from an individual. In the case of the *Attorney General vs. Vernon*; 1 *Vernon*, 281, jurisdiction was entertained by the Court of Chancery, in the case of letters patent, on the ground that fraud was properly relievable in that Court. Why should not

the complainants in this cause, if their bill was imperfect, have been directed to amend it, so as to have brought all the persons before the Court, whom the Chancellor should deem to be necessary parties, and have had such a decree made as the manifest equity in the bill entitled them to? The bill ought not to have been *dismissed* for want of equity. There is abundance of equity in the bill, and the defendants ought to have been compelled to answer, after such amendment of the bill, as would bring all the parties before the Court. If Alford Brown was a fictitious person, there was no necessity for the cancellation of the grant. If that fact had been established, the grant would have been void, and upon a decree to that effect, the General Assembly would, unquestionably, have directed a grant to be issued to the rightful owners, if, according to an adjudicated case, the judiciary could not afford a remedy.

The second ground in the demurrer ought not to have been sustained. The bill shows a right in equity to the land, and it ought to have been sustained to enforce it.

From what I have already said, it may be inferred that I think the complainants have a remedy, in the manner they have proceeded to obtain their rights. And why, if their case is such as is represented in the bill, have they not a right to a decree for the possession of the land, and to a conveyance from Slaughter of all the title that he holds?

The complainants have no remedy at law, for in that forum they cannot avail themselves of the mistake, which shows a title out of them.

There is nothing in the bill which shows that a statutory title has been perfected in the defendants. The fraud and the recent discovery of it, as alleged, is sufficient to relieve the case from the bar, if it had appeared that there had been a continuous uninterrupted possession of the land for seven years prior to the institution of this suit. I think, therefore, that the judgment of the Court below ought to be reversed.

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7. A. was indebted, by stock note, to the M. & M. Bank of Columbus. By contract with B., the stock was transferred from A. to B., and A's note delivered up to him by the Cashier of the bank, upon the verbal undertaking of B. to pay the amount of the subscription to the bank. The bank subsequently ratified this transaction, B. having been elected a director upon the faith of this stock.

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See *Supreme Court Practice*, 2,

COMMISSIONER.

A Georgia Commissioner, resident in another State, has no power to certify to the official character of a person who holds his office under the authority of that State. *O'Bannon vs. Paremour.* - - - - - 489

COMMON PROSTITUTE.

See *Evidence*, 15.

CONDONATION.

See *Divorce*, 2.

CONTINUANCES.

1. When a prisoner charged with the crime of murder, applies for a continuance, he must make a strict and special showing, and it must appear that the absent person whose testimony he professes to want, is in fact a witness to some matter necessary to his defence, and if he knows of this, from information only, he ought to submit the affidavit of his informant. *Thomson vs. The State,* - - - - - 297
2. Public excitement not sufficient ground to entitle a prisoner accused of felony to a continuance, since the

passage of the Act of 1856, in relation to the empaneling of jurors. *id.*

3. A question may be asked a prisoner, who has made a showing in writing for a continuance, which is intended merely to enable the Court to procure the attendance of a person as a witness, on account of whose absence he was proposing to continue the cause. *id.*

4. Every counsel engaged in a cause ought to be prepared to conduct it, and the absence of counsel for any cause, when there is more counsel than one, ought to be seldom allowed as a ground of continuance. *Cooper et al. vs. Jones et al.* - - - - 473

CONTRACTS.

1. A shorter period than that allowed by the statute of limitations for the institution of suits, by agreement of the parties, violates no principle of public policy; provided the period fixed be not so unreasonable as to raise a presumption of imposition or undue advantage in some way. *Brown and wife vs. The Savannah Mutual Insurance Company.* - - - - 97

2. An agreement to settle a doubtful right constitutes a valid consideration to support a contract; especially if it be an agreement to settle a family controversy; such an agreement will not be considered voluntary and without consideration, but will be enforced in equity as a fair family arrangement, independent of its being a compromise of doubtful rights. *Watkins et al. vs. Watkins et al.* - - - - 402

3. When an agreement is entered into, upon sufficient consideration to sell real and personal property and divide the proceeds, and the same has been fully performed on one side, the other party will be decreed to

execute it in full, notwithstanding the agreement is by parol, and relates to land as well as negroes. *Id.*

COPARTNERS.

1. The holders of a partnership note given for a bill of goods, renewed it with one of the partners, extending the day of payment, after the dissolution of partnership, and without the knowledge of the other partner. *Held*, That this discharged the other partner. *Chamberlain & Bancroft vs. Stone.* - - - 310
2. The holders of a partnership note, after the dissolution of the partnership, renewed the note with one partner, without the consent of the other, extending the day of payment, and thus discharged the other partner. Afterwards, he, with a knowledge of the facts, agreed to pay the note. *Held*, That he was bound by his promise. *Id.*
3. A judgment against one of two partners, may be revived against the executors of the party against whom the judgment was rendered, and the plaintiff is not driven to pursue his remedy against the surviving partner. *Wright, Bull & Co. vs. Harris & Sapp.* - 415

CORPORATIONS.

See *Railroads*, 4.

COVENANT.

A covenant that runs with the land, does so, by virtue of being, as it were, *annexed to the land*. Therefore, if the covenantor has no title to the land, the covenant cannot run with the land—BENNING, J. *Martin, adm'r vs. Gordon.* - - - 533

CREDITORS.

See *Marshaling Securities*, 1, 2, *Principal and Surety*, 1, *Trustees*, 1.

CRIMINAL LAW.

1. An indictment is sufficiently technical and correct if it state the offence so plainly that it may be easily understood by the jury.
2. In an indictment for forcible entry and detainer, the prosecutor who was dispossessed, or from whom the possession is detained, is a competent witness. *Kersh vs. The State.* - - - - - 191
3. On the indictment of B. for the murder of G. by stabbing, the Court charged, that if there was an attempt by G. to commit a serious personal injury on B., and he, B., in a sudden heat of passion, killed G, he was guilty of voluntary manslaughter.
Held, That, *serious personal injury*, must be construed to mean, an injury greater than a provocation by mere words, and less than a felony; and, therefore, that the charge was right. *Buchanan vs. The State.* - 282
4. The formation and expression of an opinion, from report, as to the guilt or innocence of a prisoner, does not disqualify a person from serving on his trial, as a juror. *Thompson vs. The State.* - - - 297
5. The terms in the statute "serious personal injury on the person killing" means a bodily injury, and not a personal affront—or a personal wrong. *Id.*
6. Where the proof in favor of a defendant is stronger and more direct than the evidence against him, there is

room for a reasonable doubt, at least, as to his guilt, and he ought not to be convicted. *Reynolds vs. The State.* - - - - - 427

DAMAGES.

1. Upon a question of fraud in the sale of land, the testimony should be restricted to its value at the time of sale, and not its present worth, in order to fix the damages. *Gaulding vs. Shehee.* - - - - - 438

2. Upon a suit for damages for a breach of warranty, the amount of consideration money recited in the deed, is inquirable into, and neither the grantee nor any subsequent conveyancee, in the absence of fraud, in case of eviction, is entitled to recover more than the price actually paid for the land, with the interest thereon. *Martin, adm'r vs. Gordon.* - - - - - 533

See *Evidence*, 12. *New Trial*, 15.

DECEIT.

See *Pleading*, 4.

DELIVERY.

1. To constitute a good and valid gift of personal property, there must be a delivery, actual or symbolical or a writing. The acts and declarations of the donor, that he had given the property, are admissible in evidence. *Burney, adm'r vs. Ball.* - - - - - 505

2. An admission that a gift of a slave has been cancelled, is that from which a jury is *authorized*, though not *bound*, to infer a *delivery back* of the slave. *Sanderlin vs. Sanderlin.* - - - - - 583

See *Deeds*, 1.

DEEDS.

1. Delivery is essential to a deed. *Oliver and wife et al. vs. Stone and wife.* - - - - - 63
2. A deed made by legatees to an executor when under age is *prima facie* void, but if he show that they had the full benefit of what it was sold for at fair legal sale, they cannot complain. *Wellborn vs. Rogers and wife* 558.

DEEDS, CONSTRUCTION OF.

1. ▲ deed of assignment for the benefit of creditors, conveying all the property of the debtor, and then setting forth specially certain slaves by value without further saying "all other slaves not mentioned," or not "remembered," or words equivalent, conveys only the negroes whose names are mentioned in the deed. *Roberts vs. Boylan.* - - - - - 40

DEMAND AND NOTICE.

An order drawn by A. on B. in favor of C., to pay the latter \$88 37-100 *in lumber*, is not such an instrument as requires demand and notice, in order to bind the drawer. *Smith vs. Barnes,* - - - - - 442.

DILIGENCE,

See *Railroads*, 1, 2, 4.

DISTRESS WARRANT.

1. A Justice of the Inferior Court has not the right to issue a distress warrant for rent, under the Act of 1811. *Keaton vs. McDonald,* - - - - - 166

DIVORCE.

1. The divorce law of 1850, not being retroactive, acts of cruel treatment, done before its passage, cannot be

- grounds of divorce under the law. *Buckholts vs. Buckholts*, - - - - - 238
2. If, after an act of cruelty done by the husband to the wife, she lives with him for many years, and has by him numerous children, and would probably still live with him, but for the interference of a child, the act is condoned by her. *Ib.*
3. A total divorce will not be granted on evidence consisting, *exclusively*, in confessions of the defendant. *Ib.*

DORMANT JUDGMENTS.

- A sale made under dormant judgment is void. *Welch vs. Butler et al*, - - - - - 445

DYING DECLARATIONS.

1. Declarations of a person made *in extremis*, and at the point of death, when he had no hope of recovery, admissible as dying declarations. *Thompson vs. the State*, - - - - - 297.

EJECTMENT.

1. A having no title, sold to B. and conveyed with warranty. Afterwards, A. acquired the title. In a suit by B. for the land against a third person, *held*, that on A.'s acquiring the title, a *perfect equity* vested in B. which entitled him to recover the land. *Goodson vs. Beachum*, - - - - - 150
2. A bond for titles must be proved, before it can be used in ejectment as evidence to show color of title. *Fitzgerald vs. Williams and Pace*, - - - 343
3. A. being in possession of land, claiming it *bona fide* as his own, is informed by B. that the lot belongs to C. Whereupon, A. authorizes B. to buy the land for

him of C. This is no attornment to C., especially when it turns out that C. was not the owner of the land.

Watson vs. Tindall, - - - - - 494

4. A., under a parol gift from B., enters upon the possession of a lot of land, and some five years thereafter, B. executes to A. a quit claim deed to the lot.

Held, That the title does not relate back so as to constitute adverse possession to the extent of the boundaries in the deed, from the time when A. took possession under the parol gift. *Id.*

5. Where the lessor of the plaintiff in ejectment is dead at the time the action is brought, there can be no recovery upon his demise; where he dies intermediate the bringing and trial of the suit, costs only can be recovered. *Id.*

- 6 The civil law will presume a person to be living at a hundred years of age, and the common law does not stop much short of this. *Id.*

7. Where the plaintiff in ejectment is examined as a witness, and testifies, that inquiry having been instituted by his counsel as to the death of the grantee of the land, he is informed by him and believes that he is dead, and that the action is prosecuted in the name of the grantee, for his benefit alone, this is evidence upon which the jury have a right to find that the grantee is dead; and it is error in the Court not to instruct them accordingly, when requested to do so. *Id.*

See *Estoppel.*

ENGLISH STATUTES, NOT OF FORCE.

1. The statute of 32d Henry 8th against maintenance, not in force in this State. See *Morris vs. Monroe*, 23d *Ga. Rep.*, p. 82. *Harring vs. Barwick,* - - -

EQUITY.

1. If a party is prevented by sickness from appearing at the proper Court to make his defence at law, he is entitled to relief in a Court of Equity. *Clifton vs. Livor et al*, - - - - - 91
2. When a defence is purely equitable, a party is not foreclosed from asserting his right by suffering judgment *at law* to go against him. *Id.*
3. An allegation in a bill, that trustees for the sale of property will pursue their duty to a certain extent, but afterwards the bill alleges, upon conjecture, and assigns no fact or circumstance to warrant it, that they will do an act grossly wrong, such fanciful allegation is insufficient to raise an equity. *Carter vs. Neal*, 346
4. A complainant cannot have a decree that money raised from the property of a defendant shall be handed to her to pass over to a creditor at whose instance the money was raised, and assume his place in regard to enforcing a demand, already satisfied, against private property of stockholders. *Id.*
5. When the bill itself shows upon its face that the only rights to which the complainant is entitled, can be just as well provided for and protected at law as in equity, the bill will no longer be retained. *Koochokey vs. Administrators of Flewellen*, - - - - - 60

EQUITY—PLEADING AND PRACTICE.

1. The widow of intestate claiming a part of the property under an agreement that it should be conveyed in trust for her, and claiming another part of the property

by right of survivorship, need not be made a party complainant to a bill filed by a temporary administrator to preserve the assets, as no final decree can be made in the premises. *Johnson et al. vs. Brady, adm'or.* 131

2. Motions to amend a bill and to dissolve an injunction are much in the discretion of the Court, and unless that discretion is used against the law and justice of the case, this Court will not interfere with its exercise. *Hook vs. Brooks.* - - - - - 175

3. It is not error for the Court to allow an amendment to be made to a bill adding persons as parties defendant, who are proper parties, although they may not be necessary parties. *Id.*

4. If from the bill and answer, there is a *prima facie* equity in favor of the complainant, it is not error in the Court to postpone an argument to dissolve an injunction, after additional parties are added, until the answers of the new parties are in, and more especially, if from the circumstances disclosed in the bill and answer, it is a proper case for a hearing before a special jury. *Id.*

5. The mere failure of a defendant to answer an allegation in the bill, does not amount to an admission of the allegation and make it evidence against him. *Keaton vs. McGuire, adm'r.* - - - - - 217

6. The complainant cannot avail himself of matter not contained in the bill, or in the answer, although it may be contained in the evidence. *Id.*

7. One creditor may sue in equity in behalf of himself and others standing in the same relation to the subject of the suit. *Schley et al. vs. Dixon et al.* - 273

8. When a party has to go into equity to enforce a judg-

ment obtained by him at law, that judgment must be presumed to have been regularly obtained upon due proof of every allegation to entitle the plaintiff to recover *Id.*

9. The maxim "*actio personalis moritur cum persona*," does not apply to cases of which Courts of Equity have cognizance. *Id.*

10. Charges establishing a plain liability of parties sued must be answered. *Id.*

11. A complainant may move to dismiss his bill, with costs, as a matter of course, at any time before a decree; and file a new bill for the same object at any subsequent time. *Cook vs. Walker.* - - - 331

12. It is too late to move to dismiss a bill in equity, several terms after it was filed, on the ground that a sum of money, admitted to be due by complainants, has not been deposited in Court. The Court below ought to be moved to compel them to bring it in. *Cooper et al. vs. Jones et al.* - - - 473

13. When a bill of interpleader is filed by trustees to obtain the directions of a Court of Chancery, and a proper case is made, it is too late for defendants, after long acquiescence, to move to dismiss it, on the ground that it was filed too late. *Id.*

14. Any amendment of a bill, however trivial and unimportant, authorizes a defendant, though not required to answer, to put in an answer, making an entirely new defence, and even contradicting his former. *Burney, adm'r, vs. Ball.* - - - 505

15. Under the Act of 1853, a bill or answer may be amended, at any stage of the proceeding, in matter of form or substance; and this is the right of the party—

the Court prescribing the terms upon which it shall be exercised. The terms, however, must be such as not to amount to a negation of the right. *Id.*

16. Whether an answer in equity be contradictory and irreconcilable, is a question of fact to be determined by the jury. The effect of such an answer is a question of law, to be decided by the Court, and stands upon the same footing as the testimony of a witness who contradicts himself. *Id.*

17. The answer of a defendant, not a party to the issue to be tried, is not evidence in the cause. *Wellborn vs. Rogers and wife.* - - - - - 558

18. A bill contained a statement that H. S. died "seized" of a certain slave. The answer said that H. S. and J. S. called on the defendant to bear witness that H. S. held the slave as a loan.

Held, That this was responsive. *Sanderlin vs. Sanderlin.* - - - - - 583

19. To enable the Court to determine whether sayings of a person, proposed to be given in evidence, were properly admitted, the sayings must be set out in the record, and the same in respect to the parts of bill or answer proposed to be read. *Cleghorn et al. vs. Love.* 590

20. Decretal verdict sufficiently certain when the Court can execute it. *Id.*

• See *Appeals*, 6.

ESTATES TAIL.

Jones vs. Jones, in 7 *Ga. Rep.* 76, recognized and followed. *Jennings vs. Parker.* - - - - - 621

ESTOPPEL.

1. B. had the title to a lot of land. The interest of G. in the lot was levied on. At the sale B. gave notice of his title, but was a bidder for the lot, which was knocked off to a third person.

Held, That B. was not estopped from asserting his title to the lot against the latter. *Goodson vs. Beachum.* 150

EVIDENCE.

1. Books of account, in all occupations which require them to be kept, are admissible in evidence to prove the usual subjects of book charges in such business. *Ganahl vs. Shore.* 17

2. The tendency of the judicial as well as the legislative mind, is to widen the rules for the admissibility of evidence. *Id.*

3. A party cannot claim titles to property on account of his marriage, because he had heard that the father of the wife had admitted that the property belonged to her. The statement must have been made to induce the marriage. *Morgan vs. Jones and wife.* 155

4. If there be written evidence of title it should be produced; if lost or destroyed its contents may be proved. *Id.*

5. The sayings of one who is not a party to the case, or in privity with a party, are not admissible as evidence against either party. *Bailey vs. Wood & Co.* 164

6. That a witness is interested will not be presumed; it must be proved. *Richardson, trustee, vs. Hoge.* 203

7. The sayings of an agent are not admissible against his principal, except as they form a part of the transaction, or *res gestæ*. *Mason & Dickinson vs. Croom.* 211

8. When there is an irreconcilable conflict in the testimony of witnesses of equal character and respectability, superior credit is to be given to those who have the best opportunity of knowing the facts. *Jeter & Forbes vs. Haviland, Keese & Co.* - - - 252

9. In such cases, if one or two witnesses had an interest in noting and remembering the facts, and the other had no such interest, the witness is most likely to remember whose interest it is to remember. *Id.*

10. A proposition to settle a debt made by defendant in attachment for a debt not due, before the levy, in an action for maliciously suing out an attachment, may be received in evidence. *McLaren vs. Birdsong & Sledge.* - - - 265

11. Parol evidence of an order for sale of perishable goods attached, admissible when the office of the clerk of the Court to which the attachment was returnable is searched and it cannot be found on record or of file. *Id.*

12. Evidence of the value of a stock of goods in the fall before an attachment was levied—the levy being in May, is not receivable as evidence, or as a criterion of value at that time. *Id.*

13. A witness saying that he is interested, does not disqualify him, when the facts show that he is not. *Stallings vs. Carson et. al.* 423

14. Declarations that a person is solvent, have reference to the time when the declaration is made. *Corbett vs. Gilbert.* 454

15. A woman cannot be impeached as a witness by proof

that she is a common prostitute. *Smithwick et. al. vs. Evans Ex'r.*

461

16. An attorney employed in a cause, may, when it is relevant, be examined as to the amount of his fee, and the terms on which it is to be paid. *Id.*

17. The exemplified copy of a deed re-ordered in 1836, but without proof of its execution—the grantor signing his name by his mark—is not admissible in evidence, especially when it does not satisfactorily appear that the original ever existed. *Watson vs. Tindall.*

494

18. A witness cannot give his opinion or belief by assigning his reasons therefor, in cases where the opinion or belief is not admissible in evidence without such reasons. *Parker et. al. vs. Chambers.*

518

19. Habits of business of a man not admissible to prove, from his conduct, whether the sending of a slave with a married daughter was a gift or a loan: in this particular case, there being no evidence of other similar acts to other children. *Id.*

20. A witness who testified to facts which took place when she was very young, after a lapse of fifty-four years, ought to be very consistent, to entitle her evidence to full credence. *Id.*

21. A will is admissible in evidence when both parties claim under the testator. *Id.*

22. One of two defendants, against whom a verdict has been rendered, appeals, the other does not, the defendant not appealing, being no party to the issue to be tried on appeal, is a competent witness. *Wellborn vs. Rogers and wife.*

568.

23. When the sworn answer of the defendant, offered as a witness, has been read to the Court, it was not necessary for the party offering the witness, to state what he expected to prove by him. *Id.*

24. A slave passed from the father to the son, on the marriage of the son; the question was, whether the slave so passed as a gift, or as a loan. The father had said, a month before the marriage, that he intended to give the son the slave.

Held, that evidence of this saying was admissible against the father. *Sanderlin vs. Sanderlin.*

583

25. It is not proper that a question to a witness should assume that he has made a statement which, he says, he has not made. *Id.*

26. The sale of property of the same defendant is no evidence to prove the value of property of the same kind sold a month afterwards. *Cleghorn et. al. vs. Love.*

590

27. When three persons call another aside to speak to him, what one says in the presence and hearing of the others, is evidence against all. *Id.*

See Attorney and Client 2. *Equity Pleading and Practice*, 16, 17, 18, 19. *Grant. Husband and Wife*, 5. *Interrogatories passim.* *Malicious Prosecution* 1, 2. *Wills* 4. *Administrators and Executors* 3.

EVIDENCE, NEWLY DISCOVERED.

See New Trial, 2, 13.

EVIDENCE, SECONDARY.

1. The affidavit of a party to a cause, that an original paper, of which he had the proper custody, was in his

possession, that it had disappeared without his consent, and was seen in the possession of the counsel of the opposite party, is sufficient proof to admit secondary evidence. *Morgan vs. Jones and Wife.* - - 155

2. Upon the proof of the same the counsel for defendant in error ought to have been compelled to answer on the motion of plaintiff's counsel, if he had the deed in Court, and to produce it if he had. *Id.*

3. A party must always make the usual preliminary proof for the admission of secondary evidence, or that kind of evidence will not be admitted. *Id.*

See *Dying Declarations.*

EXCEPTIONS.

See *New Trial*, 1. *Practice in Superior Court*, 4.

EXECUTIONS.

Where a Justices' Court execution issued in Twiggs county, and was levied on land in Early county, and there was an entry by a constable, of "no personal property to be found," before the *fi. fa.* was backed by the Justice of the Peace in Early county, and the levy in Early was made by a different constable from the one who made the first return, it will be presumed that the first entry was by a constable of Twiggs county, where the defendant resided, and where the judgment was obtained. *Hollingsworth vs. Dickey.* 434

A transfer of a *fi. fa.* prior to the Act of 1829, is no satisfaction of the debt. *Id.*

EXECUTOR, DE SON TORT.

A donee of property from a person just before his death,

taking or retaining possession of the property, the deceased having died at her house, becomes executor *de son tort*, if there are creditors. *Gleaton vs. Lewis & Son.*

209

FRAUDS.

1. The indebtedness of a party making *bona fide* a deed of trust, and who makes no provision for the payment of prior debts, is not fraud. *Carter vs. Neal.*

346

2. A party making a positive assertion of the solvency of the maker of a note, in order to enable him to pass it off in a trade, when from circumstances he is presumed to know his condition, and he knows that the party with whom he is trading supposes him to be acquainted with it, is liable, if the maker be insolvent at the time. *Corbett vs. Gilbert.*

454

See *Administrators and Executors*, 4.

FRAUDULENT ASSIGNMENTS.

S., a debtor, in failing circumstances, was indebted to W. \$1,350; and to secure the payment "sold, transferred and assigned" notes and accounts amounting to \$2,800. The original indebtedness from S. to W. was not extinguished by his assignment.

Held, that the transaction being neither a sale or a mortgage, but a partial assignment, was obnoxious to the prohibition in the Act of 1818, and void. *Watkins vs. Jenks & Ogden.*

431

FRAUDS, STATUTES OF.

Where the time when the contract is to be performed depends on some contingency, it is within the 4th sec-

tion of the statute of frauds, provided the contingency cannot happen within the year; but if it may happen, it is not within the statute, whether it actually do happen or not. *Burney, Administrator, vs Ball.* 505

GARNISHMENT.

Hoskins, Huskill & Co. sued out a garnishment against Cothran & Sloan. The Planters Bank of Savannah sued out a garnishment against Sloan only. The plaintiffs in both cases were in pursuit of the same debt, that was due from *Cothran & Sloan*, and not from Sloan *separately*. Cothran was living. *Held*, that the debt was attached by the garnishment of Hoskins, Huskill & Co., to the exclusion of the garnishment of the Bank. *Hoskins, Huskill & Co. vs. Johnson & Garret.* 625

GIFT.

See *Delivery*, 1, 2. *Ejectment*, 4.

GRANTS.

A grant was issued to Alfred Brown. There was no such person. *Held*, that this made a case of *latent* ambiguity, and that *aliunde* evidence was admissible to show who was the person meant. *Bowen et. al. vs. Slaughter & Brown.* 320

GUARDIAN AND WARD.

An exemplification of the proceedings of a Court of Ordinary, in appointing a guardian and ordering the sale of the ward's land, did not show upon its face any thing to give the Court jurisdiction, yet, *Held*, that as the Court of Ordinary is a Court of general jurisdiction,

it was to be presumed, that something existed by which the Court got jurisdiction, and, therefore, that the exemplification was admissible as evidence of such appointment and order. *Bush vs. Lindsey.* 245

HABEAS CORPUS.

In *habeas corpus* cases before the Justices of the Inferior Court, the Court does not expire with the delivery of the judgment, but remains in existence, and subject to certiorari. *Livingston vs. Livingston.* 379

See *certiorari* 2.

See *Possessory Warrant.*

HUSBAND AND WIFE.

1. In a marriage settlement, the property was settled in trust among other things to and for the joint use of the wife and husband "during their joint lives, but not to be subject in any way or manner, to the debts contracts or engagements" of the husband.

Held, 1. That the joint estate thus created, did not by the marriage pass to the husband, but remained the wife's. *Kempton et al., vs. Hollowell & Co.,* - 52

2. That her power over the estate was so restricted, that she could not by endorsing her husband's debts subject the estate to those debts. *Id.*

3. If the interest of the husband is such, under a marriage settlement, that it cannot be seized and sold at law to satisfy debts against him without prejudice to the interests of other parties who take under the settlement there is a case for equity. *Id.*

4. When a deed or will settles property on a *feme covert* to her separate use and in no wise to be subject to the debts or contracts of her husband, the wife cannot dispose of the property for that purpose or authorize her husband to do it. *Hicks trustee vs. Johnston*, - 194

5. Where the husband has been examined in a case, the wife is not admissible to discredit him, by proving facts, a knowledge of which she acquired by reason of the marriage relation.—BENNING J. hesitating. *Keaton vs. McGuire, adm'r.*, - - - - - 217

6. Trust for payment of husband's debts, surplus to wife; the surplus, if decreed to husband, should be in trust for the wife, but the wife ought to be a party. McDONALD. *Cleghorn et al. vs Love*, - - - 590

7. An insolvent debtor was entitled, in right of his wife, to a share in her father's estate, the share being in the hands of the executor of that estate; it was agreed between him and his wife, and the executor, that the share should be paid over to her as her separate property, to be placed by her in the hands of a trustee. This agreement was executed.

Held, That if the share was not more than enough for a suitable provision for the wife, this arrangement was valid, and the fund was not subject to the husband's debts. LUMPKIN and BENNING, J. J. *Hubbard vs. Price & Jennings*, - - - - - 631

See *Administrators and Executors*, 2.

ILLEGAL CONTRACTS.

1. In an application to the Legislature for a pardon, it is not unlawful to use before the Legislature an authenti-

cated copy of the evidence taken down on the trial of the convict. *Bird vs. Breedlove.* - - - 623

2. The business of attending to applications for pardon, is not restricted to attorneys at law. *Id.*

INDICTMENT.

If an indictment for burglary neglects to specify the felony which the defendant intended to commit, the defect is fatal. *The State vs. Lockhart.* - - - 420

See *Criminal Law*, 1.

INJUNCTION.

1. A temporary administrator, finding the assets of the estate of his intestate involved with other estates, and likely to be seized and sold, and the proceeds applied contrary to law, ought to ask an injunction until the affairs of the estate can be investigated, and conflicting claims adjusted. *Johnson et al. vs. Brady. adm'r.* 131
2. Injunction dissolved on the denial of the equity charged in the bill, the affidavits in support of the equity not being sufficient to overcome the denials of the answers. *Reid et al. vs. Mayor and Council of City of Macon.* - - - - - 205
3. M. bought of N. a tract of land, and took a bond for titles, conditioned as follows: "The above bound N. holds a Sheriff's deed to said land which was sold under execution, and the said N. being apprehensive that a claim may shortly be set up by some person to said land, agrees that if he establishes his title when said apprehended claim is made, that he will then make to said M. good and lawful titles, and that if he fails to establish his title. and the land should be claimed and held by suit at law, by another, before the notes for the

purchase money become due, then he shall give up said notes, and if said apprehended claim should be established after said notes have been paid, then N. shall pay back to M. the amount so paid, and interest; and if suit for said land is brought against M., N. binds himself to pay cost and expenses." More than twenty years elapsed after the date of this bond, and the purchase money never having been paid, and titles never having been executed by N., he brings ejectment against the assignee of M. for the land.

Held, That upon the payment of the purchase money and interest by M.'s assignee, he was entitled to hold the land against N. and that his rights under the bond were not affected by the statute of limitations, or lapse of time; and that he was entitled to an injunction.

Brown vs. Newsom. - - - - - 466

4. When the answer is indefinite and unsatisfactory, the injunction will not be dissolved; especially when it sets up matter in discharge of the defendant's liability.

Thomas vs. Horn, adm'r. - - - - - 481

5. A denial of the allegations of a bill, if the denial be founded merely on information and belief, will not justify the dissolution of the injunction, especially when the case is one in which irremediable loss might result from the dissolution. **Holmes vs. George et al.** 636

INSOLVENCY.

The return of *nulla bona* on an execution against a debtor, is not the highest evidence of his insolvency. His discharge under the insolvent debtor's act is higher and better evidence of that fact. **Corbett vs. Gilbert.** 454

See Husband and Wife.

INTERROGATORIES.

1. The party who took out the commission to examine a witness was in the next room to that in which the Commissioners were executing the commission, and was so known to be, by the witness. The door between the two rooms was open :

Held, That this vitiated the execution of the commission. *Mathis et al. vs. Colbert*, - - - 384

2. The answers to interrogatories were headed with a case different from that stated in the questions and commission, but there appeared enough to show that the answers, were really intended for this latter case :

Held, That they might be read in the latter case. *Id.*

3. A witness may be twice examined by the same party, by commission, in the same case. *Parker et al. vs. Chambers*, - - - - - 518

INSURANCE.

A valid legal objection to the payment of a loss on a policy of Insurance, is not a waiver of all other objections, if the plaintiff go into equity, to avoid the effect of that objection at law. *Brown and wife vs. The Savannah*

Mutual Insurance Company, - - - - - 97

JUDGMENTS.

1. A judgment, though it may be erroneous, is not void, if the Court had jurisdiction of the case and the parties. Therefore, it will, whilst it stands unvacated, be a bar to another proceeding for the same matter.

Crutchfield vs. The State, - - - - - 335

2. A judgment reversing another being itself reversed, the first judgment is reinstated, and will be considered final, after the lapse of ten years, notwithstanding at the instance of the defendant, it is remanded for further proceedings, none having been instituted within that time. *Ragan assignee vs. Cuyler administrator*, 397

3. Where the Court, either foreign or domestic, has jurisdiction over the subject matter of the action, and of the person of the defendant, and the defendant is served and appears by counsel and pleads to the merits of the suit, the judgment will not be set aside because the verdict upon which it is rendered is contrary to evidence. *Id.*

4. Courts will not allow judgments to be amended by parol proof, particularly if the judgment has been satisfied, and much time has intervened since it was rendered. *Pitman vs. Lowe*. 429

5. A judgment obtained in this State prior to December, 1822, need not be renewed. *Hollingsworth vs. Dickey*. 434

6. The entry of an officer cannot revive a void judgment. It can be revived through a Court only upon notice to the opposite party, and then takes effect from the date of the last judgment. *Welch vs. Butler et al.* 445

See *Rule against Sheriff*,

JURORS.

A juror who states in Court to the presiding Judge, that he is afraid he cannot do one of the parties justice, and the party proposes to swear him, but the Court decides

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him to be competent without, is an incompetent juror.

McLaren vs. Birdsong et. al. 265

See *Criminal Law*, 4. *New Trial*, 6.

JURIES, POWERS OF.

The jury is the Judge of the law, as well as of the fact.

BENNING J., DISSENTING. *Downing Executor vs. Bain et. al.* 372

See *New Trial*, 3.

JURY, BOARD AND LODGING OF.

The county is not liable to pay for food and lodging furnished to a jury, although ordered by the Court that the county be charged with it. *Justices of the Inferior Court vs. The State, ex rel.* - - - - 82

JURISDICTION.

The will of the testator having been proven in Georgia, and letters testamentary issued in this State, where the testator died, and the executor and legatees lived at the time, and the property being all situated here, the Courts of this State will not surrender their jurisdiction over the person of the trustee, and remit the *cestui que trusts* to a foreign power, notwithstanding the voluntary removal of the trustee thither. *McGehee vs. Polk et al.* 406

See *Distress Warrant*.

See *Judgment*, 3.

JUSTICES OF INFERIOR COURT.

See *Distress Warrant*.

LEGACY, LAPSED.

1. A party claiming a legacy as lapsed to the heir-at-law, on the ground that the legatee named in the will has had no existence, must make clear and satisfactory proof of the allegation, to entitle himself to it. *Silcox and wife vs. Nelson et al., ex'ors.* - - - 84
2. A legacy lapsed does not fall into the residuum, where it is manifest, from the will, that the testator did not intend that the residuary legatees should take any part of it. *Id.*
3. When residuary legatees are not, from the construction placed upon the will, interested in the question of lapse, they are not necessary parties to the bill. *Id.*

LICENSE.

1. A verbal license to erect a dam and fish traps, is not a license to renew the dam and traps as often as they may be swept away by the water. *Wingard vs. Tift.* 179
2. At least, such a license, after the dam and traps have been swept away, is revocable at any time, before they are renewed. *Id.*

LIMITATIONS, STATUTES OF.

1. Although a trustee disavows the trust, yet if he has an undue influence over the *cestui que trust*, the statute of limitations does not begin to run in his favor. until the cessation of that influence. *Keaton vs. McGuire, adm'or.* - - - 217
2. Statutes of limitation obtain in a Court of Equity; and, to the extent to which they obtain there, they bind the Court. *Id.*
3. If the fraud be committed on a *feme sole*, and is not

discovered until after marriage, the saving in the statute of limitations protects her during coverture. *Well-born vs. Rogers and wife.* - - - 558

4. If the trust be terminated, but the trustee continues to manage the property, and maintains his influence over the *cestui que trust*, so as to stifle enquiry, the statute will not commence running until that connection is wholly at an end. *Id.*

See *Injunctions*, 3.

LOST PAPERS.

Upon an application to establish a lost paper, the affidavit as to the existence of the original, its loss, and the copy of the instrument, need not be made by the party, but by any one who best knows the facts. *Banks vs. Dixon, adm'r.* - - - 483

MALICIOUS PROSECUTION.

1. In actions for a malicious suit, all evidence is admissible which tends on the one hand to prove the want of probable cause for the suit, and on the other to prove its existence. *McLaren vs. Birdsong & Sledge.* 265
2. Proposition by one of the defendants who had actually left the State, made after the attachment had been levied, to secure the debt, is not admissible in such an action. *Id.*

MARSHALING SECURITIES.

1. The doctrine of two funds applies only to cases where contending creditors have a common debtor. *Carter vs. Neal.* 346
2. To entitle one creditor to be subrogated to the rights

of another creditor, the former must have satisfied the latter his demand so as relieve him from trouble, expense and risk. *Id.*

MORTGAGES.

1. Deeds of mortgages, are not included in the word "conveyances," of the Act of 1826, to amend an Act, to enable *feme coverts* to convey their estates. *Cope vs. The Savannah Mutual Loan Association.* 46
2. If a mortgagee does not record his mortgage in three months, he risks having it postponed, to after-made mortgages, and to judgments obtained before he has fore-closed it; but this is all he risks. *Hardaway vs. Semmes.* 305

See *Appeal*, 1.

MORTGAGES, FORECLOSURE OF.

1. The method for the foreclosure of mortgages, given by the judiciary Act of 1799, is not confined to mortgages made to secure *liquidated* demands. *Richards vs. Loan Association.* 198
2. When a mortgage is foreclosed by "The Bibb county Loan Association," the sum for which the judgment is to be entered, is such a sum as will, by the constitution of the association, be sufficient to redeem the property on the day of the judgment, at the rate of premium at which the funds of the association are then selling. *Id.*

See *Appeals*, 1.

NE EXEAT.

1. When a bill praying for a writ of *ne exeat* is verified

in the usual form of affidavits to bills in equity, resort must be had to the charges in the bill to decide whether the facts are sufficient to entitle the complainant to the writ. *McGehee vs. Polk et. al.*

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2. By the English writ of *ne exeat regno*, the defendant was bound not to go beyond seas without leave of the Court; the act of 1830 allows an alternative, viz: to give bond for the eventual condemnation money. *Id.*
3. In bills for account and administration of assests, no certain balance need be sworn to, to entitle the complainants to the writ of *ne exeat*. It is sufficient if there is a clear affidavit of assets received. *Id.*
4. In a bill praying a *ne exeat*, it is enough that it is distinctly stated that the defendant resides out of the State. Danger of loss will be inferred from that fact alone. *Id.*

NEW TRIAL.

1. To entitle a party to a new trial, on the ground that the indictment was defective, he must have excepted thereto at the time and in the mode prescribed by statute, and his exception must have been overruled by the Court. *Wise vs. The State of Georgia.*
2. The discovery of new and material evidence after conviction, which was unknown to the party at the trial, and which he could not have known or produced by any sort of diligence, is a good ground for a new trial. *Id.*
3. When there is conflicting evidence before a jury, it is their duty to weigh it, and if, in doing so, they render a just verdict according to the proper construction and weight of the evidence, a new trial ought not to be granted. *French vs. Roll.*

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4. If the verdict is not against the weight of evidence, it ought not to be disturbed. *Ridley vs. Ford et. al.* 183

5. The Court charged, that if B. provoked the difficulty, if he brought upon himself the necessity to kill G. to save his own life, the killing amounted to murder. The evidence showed, that B. had a bowie knife concealed about his person, and in other respects it was such as to repel the idea, that his purpose was no more than a battery. The verdict was for voluntary manslaughter. *Held*, That this charge was no ground for a new trial. *Buchanan vs. The State.* 282

6. After a verdict of manslaughter, a person made oath that one of the jurors had, before, the trial, told him that he saw the greater part of the difficulty, and that if he was a juror, he would be compelled from what he saw—he did not know how he could get round finding him guilty of murder. The juror himself, then swore that he did not see the crime committed, or hear any part of the evidence before the trial; that he had no bias; that he was a stranger to one of the parties, and almost a stranger to the other; and that he went for manslaughter, when others of the jury were going for murder. The evidence made out a case of manslaughter, if not of murder. The Court refused to grant a new trial.

Held, That this refusal ought not to be disturbed. *Id.*

7. T. & C. were engaged in a fight in which, T. stabbed C. to death. G. interfered by laying hold of C. The evidence was such, as to raise a reasonable doubt, whether G's. object in this was not rather, to separate T. & C., than to aid T. The jury found G. guilty of murder.

Held, That the verdict was contrary to the evidence.

Guilford vs. The State, - - - 315

8. After the evidence was closed, the Court told the jury, that a certain part of it was insufficient to support the plea. That part was sufficient to support the plea; but its effect was annulled by another part. No motion was made for a new trial.

Held, That for such an error, a new trial ought not to be granted by this Court. *Findley vs. Parker*, 333

9. In ejectment, the plaintiff proved the contents of a lost deed by a witness. At the time he had in his pocket an established copy of the deed, but this was not known to the defendant. The defendant moved for a new trial.

Held, That this was not a sufficient ground for a new trial. *Fitzgerald vs. Williams et al.*, - - 343

10. In ejectment the proof was, that the tenant was living on the lot of land sued for, and had fifteen or twenty acres of it enclosed. The Court told the jury, that under this proof they might find a verdict against the tenant for the whole lot.

Held, That this charge was no ground for a new trial. *Id.*

11. In England, the appellate Court will never refuse a new trial against the opinion of the presiding Judge who tried the cause; and there is nothing in the laws of Georgia which compels this Court to adopt a contrary rule.

Where the verdict of the jury is strongly and decidedly against the weight of evidence, the Superior Courts *may* (not must) grant a new trial. It is not obligatory, even in that case to do so; they may, however, grant a new trial where the evidence preponderates in favor of the verdict. *Odam vs. Nelms*, - - - 412

12. It is not sufficient to reverse the judgment of the Court, unless required positively by statute, because the Court has committed an immaterial error in its charge, but the finding of the jury is satisfactory. *Welch vs. Butler et al.*, - - - - - 445

13. If the jury find against a fact, the proof of which depends on circumstantial evidence, the Court cannot, on a motion for a new trial, assume the fact as proven. *Wight vs. Hester, administrator*, - - - 485

A party cannot obtain a new trial on the ground of newly discovered evidence, when the evidence was in his own possession, and known to be so at the time. *Id.*

14. If, from the facts of the case, the suspicions of a party ought to have been excited, and he makes no enquiry, but proceeds to trial and takes the chances of a verdict and the witness in the mean time dies, his objection ought not to be heard afterwards. *Parker et al. vs. Chambers*, - - - - - 518

15. Where there is conflicting and contradictory evidence as to the value or worth of a slave by reason of his unsoundness, and the jury adopt an average as the measure of their verdict, the finding is not illegal on that account. *Harrison and McGehee vs Powell*, 530

6. New trial granted if the verdict of the jury be against the evidence. *Cleghorn et al. vs. Love*, - 590

ORDINARY, JURISDICTION OF.

The act of the Legislature of 1829 gives the Court of Ordinary all the powers of a Court of Chancery to the extent stated therein, in regard to the sale of a

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testator's property. Judges Lumpkin and Benning say they held it under the Act of 1805. McDonald thinks not. *Wellborn vs. Rogers and wife.*

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PARTNERSHIP PROPERTY.

A caution as to *Dennis vs. Green*, 20 Ga, 386. *Hoskins, Huskill & Co. vs. Johnston & Garrett.*

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PARTIES PLAINTIFF.

See *Practice, Superior Court*, 10.

PASSENGERS.

See *Railroads*, 28.

PAWN.

Plaintiff's holding note and *fi. fa.* in pawn for payment for a coat sold to the holder, is not entitled to recover the money against the maker of the note and defendant in *fi. fa.*, if there was a prior contract between the parties that the debt should be paid in corn, and the corn was delivered in payment. If the contract was subsequent to the delivery of the papers in pawn, the plaintiffs were entitled to recover the value of the coat and nothing more. *Ridley vs. Ford et al.*

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PLEADING.

1. If in a proceeding against a Railroad company, it is alleged that the injury was committed on a different day from that found, the variance is not fatal. *The Augusta and Savannah Railroad Co. vs. McElmurry,*

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2. Defendant's plea must be a full answer to the plain-

tiff's case, so far as he intends to answer to it. *Mason and Dickinson vs. Croom*, - - - 211

3. A cause may go to trial on the petition and answer. An issuable plea may go to the jury as answer to the plaintiff's case in the petition; and the plaintiff need not join issue thereon. *McLaren vs. Birdsong and Sledge*, - - - 265

4. If plaintiff declare in deceit against a defendant for the fraudulent representation that the maker of a note, which he proposed to trade to him, was solvent, when he knew at the time he was insolvent, he must sustain both allegations by direct proof, or by circumstances, to the satisfaction of the jury. *Corbett vs. Gilbert*, - - - 454

POSSESSORY WARRANT.

- A writ of error lies for either party, in a *habeas corpus* case, growing out of an imprisonment for contempt, under the Act of 1821, for the restoration of the possession of personal property. *Livingston vs. Livingston*, 379

POWER OF ATTORNEY.

A power of attorney for the conveyance of land in this State, executed in another State, when the subscribing witness is not produced in Court, nor examined by interrogatories, must be proved as required by the Act of 1785. *O'Bannon vs. Paremour*, - 489

PRINCIPAL AND SURETY.

1. If a creditor agree to receive from his debtor a less sum in satisfaction of a greater, and the less sum is paid him and he accepts it, the contract is executed,

and he cannot treat it as a nullity and recover the balance; otherwise, if the contract is executory, and must be enforced through a court of law. *Brown vs. Ayer & Bates.* - - - - - 288

2. The discharge of the principal absolutely, without reserving the plaintiff's right against the security in the instrument, extinguishes the debt as to the surety. *Id.*

PROMISSORY NOTES.

To be a promissory note, the money specified on the face of the instrument must be payable absolutely, unconditionally, and at all events. *Corbett vs. The State.* 287

PRACTICE, IN THE SUPERIOR COURTS.

1. The verdict of a jury in the Inferior Court, not signed by the foreman, upon which judgment has been entered, is good, if the defendant has neither moved in arrest of judgment nor appealed. *Harris, sur. vs. Barden et al.* - - - - - 72

2. The party on whom the burden of proof rests has the right to open and conclude the cause before the jury. *Mason & Dickinson vs. Croom.* - - - 211

3. When a plea of tender is filed, the defendant should bring the thing tendered into Court, or aver his readiness to do it. *Id.*

4. It is too late to object that a set-off cannot be pleaded in a suit for unliquidated damages, after there has been a trial and verdict on such plea. It ought to have been made at the trial. *Brantley vs. Dempsey.* 341

5. After the close of the argument to the jury, the Court allowed the defendant to introduce further evidence on the subject of *mesne* profits. The plaintiff expressed no

surprise, asked for no continuance. The verdict was for the defendant generally.

Held, That the Court committed no error; certainly none of which the plaintiff could complain. *Mathis et al. vs. Colbert.* - - - - - 384

6. Where the plaintiff holds several notes of the defendant due at different dates and upon which separate suits are brought at the respective maturity of each, the Court will not compel a consolidation of the actions; especially when the motion to do so, is made after one of the cases has been continued for the Term. *Gaulden vs. Shehee.* - - - - - 438

7. Where two suits are pending between the same parties, upon separate notes, which are parts of the same contract, and the defence to each is precisely the same, interrogatories taken in one of the cases, may be read in both. *Id.*

8. If a jury find a verdict generally for the difference between notes, it is not error for the Court to send them back to find the amount. *Wright vs. Hester, adm'r.* 485

9. A witness may not only read his own deposition, it may be read to him in the presence and hearing of the jury to refresh his memory. *Burney, adm'r, vs. Ball.* 505

10. One of several parties plaintiff may be stricken from the declaration. *Parker et al. vs. Chambers.* - 518

See *Lost Papers.*

PRACTICE, IN THE SUPREME COURTS.

1. The Packet containing the bill of exceptions and transcript of the record, need not be transmitted under seal, by the Clerk of the Superior Court, to the Clerk of the Supreme Court. *Harring vs. Barwick.* - 59

2. If the Clerk of the Superior Court certify "that the above and foregoing is a correct and true copy from the records in my office, of the foregoing stated case," it is sufficient, and he need not use the words "complete transcript." *Id.*

3. If eleven days intervene between the signing of the bill of exceptions and filing them with the Clerk, it is a substantial compliance with the Act of 1856, notwithstanding more than ten days elapsed from the acknowledgement of service and filing the bill of exceptions. *Id.*

4. A ground of error not certified by the Court below will not be considered. *Morgan vs. Jones et ux.* 155

5. Writs of error founded on a judgment *granting* a continuance, will, in future, be dismissed; as, in such cases, any judgment of reversal must, of necessity, be futile. *Wimberly vs. Collier.* - - - 169

6. When, upon application for that purpose, the Chancellor refuses to grant an order, taking a bill *pro confesso*, and this Court can see sufficient reasons in the record to justify his refusal, the Court is bound to affirm his judgment, whether it be the reason that influenced his decision or not. *Stocks vs. Young.* - - 393

7. When a matter is brought up in which the Court below has a discretion, and that discretion has not been used illegally or oppressively, this Court will not interfere. *Cooper et al. vs. Jones et al.* - - 473

PRESUMPTIONS.

See *Ejectment*, 6. *Evidence*, 6.

PROSECUTORS.

See *Criminal Law*, 2

RECOGNIZANCE. •

1. A recognizance to appear to answer to a criminal charge, does not bind the lands, or other property, of the cognizor, until the recognizance has been forfeited and reduced to judgment. *The State vs. Carswell*, - - - - - 261
2. The State has the right to prosecute writs of error to this Court, to all decisions in the Courts below, respecting bonds, recognizances, &c., and all other matters, not strictly of a criminal nature. *The State vs. Lockhart*, - - - - - 420
3. The obligor in a recognizance is not bound to appear before indictment. *Id.*

REMAINDERMEN.

1. Remaindermen not present at a purchase of property from tenant for life, are not bound to proceed against the purchaser, nor give him notice, until the accrual of their title. *Barker et al. vs. Chambers*, - 518
2. When a legatee for life is in possession of the property bequeathed, at the death of the testator, and the executor allows him to retain the possession, it is an assent to the legacy, both as to tenant for life and remainderman. *Id.*

REQUESTS TO CHARGE.

The growing practice of multiplying requests to charge, condemned. *Burney administrator vs. Ball*, - 205

RECEIVER.

The appointment of a Receiver "does not at all affect the right." *Moise vs. Chapman*, - - - 249

RULE AGAINST SHERIFF.

A rule absolute against a Sheriff, is not such a judgment as has a lien on his property, and as can compete with judgments on verdicts against him, for money raised under those judgments from his property. *Speer vs. McPherson*. - - - 146

SALE.

See *Dormant Judgment*.

SECURITY.

See *Appeals*, 2, 4.

SERIOUS PERSONAL INJURY.

See *Criminal Law*, 3, 5.

SCIRE FACIAS.

Where suit is brought against two defendants, one of whom only is served, and judgment is confessed by an attorney, and entered up by the plaintiff against the *defendants*, (plural,) instead of the defendant, it is competent to show upon a *scire facias*, to reverse the judgment against the executors of the party served, that the attorney making the confession, had no authority to represent the party not served. *Wright, Bull & Co. vs. Harris & Sapp*, - - - 415

SEAL.

See *Practice in Supreme Court*, 1.

SHERIFF'S SALES AND DEEDS.

1. The title of a purchaser at Sheriff's sale, depends on the lien of the judgment on the property purchased. *Roberts vs. Boylan*, - - - - - 40
2. A Court of Equity will sustain a purchase at Sheriff's sale, against an assignee for the benefit of creditors, when the purchaser has committed no fraud and is without fault, and the creditors have had the full benefit of the proceeds of sale. *Id.*
3. A *bona fide* purchaser can acquire no valid title under a void judgment; otherwise, when the judgment is voidable only. *Welch vs. Butler et al.*, - - - 445
4. A Sheriff's deed must be accompanied by the execution under which the land was sold, or the judgment upon which it issued. *Watson vs Tindall*, - 494

SLAVES—EMANCIPATION OF, &c.

A will may be impeached by extrinsic evidence, as violative of the Acts of 1801 and 1818, prohibiting the emancipation of slaves in this State. *Smithwick et al. vs. Evans, executor*, - - - - - 461

STATUTE OF FRAUD.

See *Contracts*, 1.

STOCKHOLDERS.

It is not a fraud in stockholders of a company not responsible for the company's debts, to ask the passage of an act to enable the company to issue bonds, holding the private property of stockholders liable; and a stockholder may advance money on such bonds and the transaction will be good, if free from fraud. *Carter*

vs. Neal, - - - - - 346

TENDER.

See *Practice in Superior Courts*, 3.

TITLE.

See *Covenant, Ejectment*, 1, 2, 4. *Estoppel*,

TROVER.

1. In an action of trover for promissory notes, the matter in issue is the title to the notes, and not the consideration for which they were given. *Wight vs Hester, administrator,* - - - - - 485

2. Promissory notes are evidence of their own value in an action of trover. *Id.*

3. In an action of trover for a promissory note, whether the party who made the contract gave too much or too little, for the property for which they were given, cannot be enquired into. *Id.*

TRUSTEES.

1. The misconduct of trustees, for the sale of property,

cannot affect the rights of a creditor interested in the sale. *Carter vs. Neal*, - - - 346

2. Trustees cannot deal with each other in the trust property, and cannot sell to another any portion of the trust property without the assent of the *cestui que trust* who must be competent to assent. *Cleghorn et al. vs. Love*, - - - 590

3. All debts embraced within a trust for payment of debts should be paid. *Id.*

See *Administrators and executors*, 6, 7.

TRUSTEES AND CESTUI QUE TRUSTS.]

1. A receipt in full given by the *cestui que trust* to the trustee, is *prima facie* evidence of a settlement in full between them; and consequently casts on the former, the burden of proving, that the settlement was not in full. *Keaton vs. McGuire administrator*, 217

2. An unbroken continuance of the management of the the property of a *cestui que trust*, by a trustee, is in effect, a continuance of the trust, and a settlement between the parties may be impeached for any of the causes for which a settlement between a trustee and *cestui que trust* may be impeached; and the statute of limitations will not begin to run in cases of fraud until tho fraud is discovered, if the party is not in *laches*, and is under no disability. *Wellborn vs. Rogers and wife*, - - - 558

3. It is competent for a Court of Chancery to adjust, in one suit, the rights of all parties who complain of the

breach of a trust growing out of the same transaction, when an investigation of one involves an enquiry into the other. *Cleghorn et al. vs. Love*, - - - 590

4. If trustees to sell and pay debts, sell within a reasonable time for a fair value, and apply the proceeds faithfully to the payment of the debts, they have discharged the trust to that extent. *Id.*

See *Limitations*, 1, 4.

VENDOR AND PURCHASER.

1. If A. sells land to B. giving him a bond for titles, and subsequently conveys to C. who has full knowledge of the prior sale, he is in no better condition than A., but is affected with all the equity existing between the previous parties. *Rhodes vs. Doss et al.*, - - - 478
2. A person having no title, conveying land by deed with warranty, and subsequently acquiring title, cannot recover the land from his feoffee. *O'Bannon vs. Paramour*, - - - - - 489

VERDICT.

See *New trial*, 4. *Practice in Superior Court*, 1.

VERDICTS.

The verdict of a jury may be amended in form, to correspond with the manifest intent of the jury apparent in the verdict. *Corbett vs Gilbert*, - - - 454.

WAIVER.

Notwithstanding time is of the essence of the contract,

it may be waived; and a subsequent offer to fulfil the contract, and urging a compliance on the other side, instead of treating the contract as at an end, amounts to a waiver. *Rhodes vs. Doss et al.*, - - - 478

See *Insurance*.

WARRANTY.

See *Damages*, 2. *Vendor and purchaser*, 2.

WILLS—CONSTRUCTION OF.

J. R. died in 1803, leaving a considerable estate. By the 4th item of his will, he declares as follows: "After the foregoing dispositions, I give and bequeath my whole estate, real and personal of what description soever, in manner and form following: To my beloved wife Jane Nesbit, the sole direction of the whole, with the guardianship of my several children by her, until they arrive at the age of twenty-one years, respectively, when each of my children shall receive a share or dividend of my estate, in just proportions by appraisement of my executor, &c., reserving one-third of my estate to the exclusive use of my beloved wife during her life, and at her demise, the said third part to revert to my children, or the survivors, share and share alike," &c. And the 5th item of the will is as follows: "Should it be the divine pleasure of Almighty God, to take from this life my dear wife, and all my children, before they arrive at maturity, or in case of their all dying single or childless, then in that case, *what may remain* of my said estate, shall go to my brothers, William, Andrew, Alexander, and David, and their heirs, in four equal proportions, &c." *Held*, That under the words of the will, the daughters took a fee, defeasible upon the events of either dying before arriving at woman-

hood or puberty, or single, or without children; and that an absolute power of disposition could not be implied from the words, "*what may remain*," so as to vest an absolute fee in the children, and that the limitation over to the brothers of the testator was good by way of executory devise.—LUMPKIN, J. *Robertson et al. vs. Johnston, trustee, et al.* - - - 102

A testator, after bequeathing his "whole estate" to his wife and daughters in certain proportions, added, "should it be the divine pleasure of Almighty God to take from this life my dear wife, and all my children, before they arrive at maturity, or in case of their dying single or childless, then and in that case, what may remain of my said estate, shall go to my brothers." *Id.*

1. *Held*, First, that the expression, "what may remain of my estate," was not to be so read, as to make it confer on the daughters, the absolute power of doing with the "estate" whatever they pleased; but was to be so read, as to make it confer on them, only a power corresponding to the interest which they took; or so read as merely to make it designate an estate in remainder, and, therefore, as not directly conferring any power at all.—BENNING, J. *Id.*

2. *Held*, Secondly, that the word, "maturity," was to be taken by its sense, of *puberty*, and therefore, that there was no sufficient reason for changing the word, "or," into the word *and*—BENNING J. *Id.*

3. A man's will was to this effect: I give "all my estate" to my wife; "but in case" she marry again, I give it to my five children. She married again.

Held, That she lost the estate, and it went to the children. *Snider et ux. vs. Newsom, executor,* - - - 139

4. A testator, after giving to his wife a large part of his property, said: "This devise and bequest of the foregoing property, real and personal, to be in lieu and in bar of dower, and of the usual allowance to widows for their year's support, and in lieu and in bar of all other claims upon my estate in any way whatever." After making the will, he acquired other lands.

Held, That the case was one in which the widow was bound to elect, whether she would take the legacy, or take these after acquired lands. *Raines vs. Corbin and wife*, - - - - - 185

See *McDonald's dissenting opinion*, p. 665.

5. A legacy of \$4,000 to be paid in bonds is not a legacy that bears interest from the testator's death. *Downing, executor, vs. Bain et al.*, - - - - - 372

6. J. gives to his daughter C., one negro woman, Hester, together with her issue and increase, to her use, and the lawful heirs of her body forever; if she should die without leaving a lawful heir of her body, then the property to revert back to the estate, and be equally divided amongst testator's other heirs.

Held, That under the Act of 1821, the daughter took an absolute fee in the property. *Hose et al. vs. King and wife*, - - - - - 424

7. The bequest of a negro when a certain debt is paid, does not charge that negro with the payment of the debt. *Wellborn vs. Rogers and wife*, - - - - - 558

WILLS—EXECUTION AND PROBATE OF.

1. If the person who writes the will, takes a large benefit under it, then, in order to show that the testator knew the contents of the will, it is necessary to show, that

the will was read over to him, or by him, or to show that he gave instructions for such a will, or to show something equivalent as evidence to one of these facts.

Hughes vs. Meredith and wife, - - - 325

2. A paper in which it is declared to be the last will and desire of the person who executes it, and in which he revokes all former wills, and leaves his property to be distributed under the laws of Georgia, is a will, and the Ordinary has jurisdiction to admit it to probate.

Lucas vs. Parsons et al., - - - 640

3. A will disposing of property as the laws of distribution would decide it, is good, and the Ordinary has jurisdiction of it. *Id.*

4. A contested will may be read to the jury, as the subject to which the evidence is to apply, and the reading imparts to it no validity. *Id.*

5. The subscribing witnesses may be permitted to testify that they subscribed the will in the presence of the testator, whether the attestation clause so states or not. *Id.*

6. When a caveat against a will charges the will to be the result of a special delusion *against the caveator*, the attention of the jury ought to be called specially to that issue. *Id.*

See *Jurisdiction. Slaves, Emancipation of.*



